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Petitioners, Dianne Troupe and Leon Waiters, Jr., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Troupe v. Sarasota County, Florida*, 419 F.3d 1160 (11th Cir. 2005), and is reproduced in the Appendix at App. 1a. The opinion of the District Court granting Respondents' Motions for Summary Judgment is unreported and is reproduced in the Appendix at App. 23a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 3, 2005. A timely petition for rehearing and rehearing en banc was denied by the court of appeals on September 29, 2005. Pursuant to this Court's Orders dated December 12, 2005 and February 2, 2006, the deadline for filing the instant petition for writ of certiorari was extended to and including February 26, 2006. The jurisdiction of this Court is thus timely invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . "

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no person shall be deprived "of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 provides, in relevant part, that "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress"

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 involving the use of deadly force to seize a fleeing suspect. On September 30, 1999, Ricardo Robinson, Jr., a 19-year old African-American male, and Leon Waiters, Jr., a 23-year old African-American male, were passengers in a motor vehicle intentionally fired upon by two Sarasota County (Fla.) Sheriff's Deputies, Timothy Bauer and Kevin Gooding. The driver of the vehicle, Ryan Hart ("Hart"), was being sought by police in connection with an outstanding arrest warrant for the non-violent crime of possession of controlled substances with intent to sell same. Hart attempted to avoid arrest by fleeing in his automobile. The two officers, with knowledge that there were passengers inside the vehicle and also believing them to be criminal suspects, fired their weapons at the fleeing vehicle in an effort to prevent its escape. Hart, the driver of the vehicle, was mortally wounded by the gunfire, and the vehicle crashed into a wall approximately ten seconds later, killing Robinson and seriously wounding Waiters.

Despite the fact that numerous witnesses testified that no law enforcement officer was in the path of, or otherwise endangered by, the moving vehicle, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents, concluding, *inter alia*, that (1) there was no "seizure" of the passengers because Petitioners "*did not allege that Gooding or Bauer had the intent to cause*

harm unrelated to the arrest," and, further, that the officers' use of deadly force was directed only at the driver of the vehicle, and not the passengers; (2) the driver's decision to flee in his automobile, rather than surrender to law enforcement officers, was the "intervening" cause of Petitioner's injuries; (3) the officers' actions were justified because a reasonable officer "*could have perceived*" that the driver posed a threat of serious physical harm and "*could [have] potentially endanger[ed] more lives*"; and (4) the officers were entitled to qualified immunity based on a determination by the Court that the officers acted reasonably. The Eleventh Circuit also affirmed the dismissal of all claims of § 1983 municipal liability against the Sarasota County Sheriff and the municipality of Sarasota County, Florida.

REASONS FOR GRANTING THE PETITION

I.

The Eleventh Circuit's Application Of A Fourteenth Amendment Standard In Assessing The "Seizure" Issue Undermines This Court's Prior Rulings Identifying The Fourth Amendment As The Proper Constitutional Provision Governing Excessive Force Claims.

In holding that the officers' use of deadly force did not constitute a "seizure," the Eleventh Circuit improperly employed *Fourteenth Amendment* due process principles. Specifically, the Eleventh Circuit stated that (a) the use of deadly force "does not give rise to a *due process deprivation* claim unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest"; and (b) "[t]he plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest." (App. 15a) (emphasis supplied). The above findings are of no moment to the *Fourth Amendment* "seizure" analysis, and the Eleventh Circuit's holding in that regard is the only known instance in

which a federal appellate court has applied the higher threshold of a Fourteenth Amendment substantive due process claim to the Fourth Amendment "seizure" inquiry.

The Eleventh Circuit's attempt to equate a "seizure" with a Fourteenth Amendment due process deprivation undermines this Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). In *Graham*, this Court held that "*all* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 190 U.S. at 388, 109 S.Ct. at 1871 (emphasis in original); *see also Saucier v. Katz*, 533 U.S. 194, 204, 121 S.Ct. 2151, 2158 (2001) ("In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's 'objective reasonableness standard,' and not under substantive due process principles."); *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 (1985) ("there can be no question that apprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). The above-cited decisions leave no doubt that that this Court has unequivocally settled the question of the proper constitutional provision under which excessive force claims should be analyzed by lower courts.

Prior to the Eleventh Circuit's decision in this case, no federal appellate court had ever suggested that a Fourteenth Amendment standard applied to an excessive force claim. To prevail on a Fourteenth Amendment substantive due process claim, a plaintiff must demonstrate that the state actor engaged in arbitrary conduct so egregious that it "shocks the conscience." *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1070 (1992). Such a standard is rarely, if ever, satisfied in a traditional

excessive force case. Thus, if the Eleventh Circuit's decision were allowed to stand, plaintiffs bringing "excessive force" claims pursuant to § 1983 would hereafter face an unduly stringent standard for establishing a "seizure," and one which is contrary to this Court's rulings in *Graham* and *Saucier*.

II.

The Eleventh Circuit's Ruling That Shooting The Driver Of An Automobile Does Not Constitute A "Seizure" Of The Passengers Conflicts With The Prior Rulings Of This Court And The Decisions of Several Circuit Courts.

In addition to analyzing the "seizure" inquiry under the wrong constitutional provision, the Eleventh Circuit deviated from the precedent of this Court when it held that stopping the driver of a vehicle with deadly force "does not constitute a seizure of [his] passenger[s]." (App. 15a-16a). The Eleventh Circuit's approach would thus limit seizures to "intervention directed at a *specific individual*" (App. 14a), implying that persons not specifically targeted by a police officer cannot be "seized" for Fourth Amendment purposes even if the officer was both aware of their presence and the risk that they faced when he applied deadly force. Such a conclusion is contrary to the principles established in *Brower v. County of Inyo*, 489 U.S. 593 (1989), where this Court held that a Fourth Amendment "seizure" occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 596 (emphasis in original). Further, the *Brower* Court cautioned against drawing "too fine a line" in applying the "means intentionally applied" standard, explaining that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599. Thus, a "seizure" can occur for Fourth Amendment purposes "even when an *unintended person* or thing is the object of the detention." *Id.* at 596. (emphasis supplied).

The *Brower* standard has been met in the present case. Regardless of whether Gooding and Bauer actually intended to "seize" the two passengers, the fact remains that they intentionally fired their weapons at the moving vehicle with the intention of disabling it, armed with the knowledge that there were two passengers inside that vehicle. (App. 27a & n.1). Further, not only were Bauer and Gooding aware of Petitioners' presence inside the vehicle, but they also believed them to be criminal suspects, as evidenced by their statements to police investigators following the shooting.

The Eleventh Circuit's "no seizure" holding clearly resulted from its flawed reading of *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998). In *Lewis*, this Court held that when injury or death results from a high-speed police chase, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, *necessary for a due process violation.*" *Id.*, 523 U.S. at 836, 118 S.Ct. at 1711-12 (emphasis added). Thus, under *Lewis*, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight *do not give rise to liability under the Fourteenth Amendment . . .*" *Id.*, 523 U.S. at 854, 118 S.Ct. at 1720 (emphasis supplied). Although the Eleventh Circuit specifically cited *Lewis* when it held that stopping the driver of a vehicle does not constitute a seizure of his passengers (App. 16a), *Lewis* is clearly inapplicable here since: (1) Petitioners are not alleging a Fourteenth Amendment due process violation, but, rather, a Fourth Amendment seizure, and (2) the application of deadly force by Bauer and Gooding did not occur in the context of a "high-speed" vehicular pursuit (as in *Lewis*), but, instead, occurred in the front yard of a residential dwelling where the officers were "on foot."

In addition to conflicting with the general principles enunciated in *Brower* and *Lewis*, the Eleventh Circuit's decision--limiting the focus of the "seizure" inquiry to Hart--

is in direct conflict with the decisions of other circuit courts, including the Fifth Circuit and Sixth Circuit, which hold that the application of deadly force at a fleeing vehicle *with the knowledge that there are passengers inside* constitutes a "seizure" of *all* of the occupants inside the vehicle. *See Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985) (passenger was "seized" when officers, with knowledge that the passenger was inside and with no reason to suspect her of wrongdoing, used roadblock to stop vehicle); *Fisher v. City of Memphis*, 234 F.3d 312, 315-19 (6th Cir. 2000) (officer "seized" passenger when he fired weapon at vehicle, and bullet went though driver's side window hitting passenger, who was not a suspect). The guiding principle under each of these decisions is that the "*intent to stop a car includes intent to stop everyone inside the car.*" *Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (emphasis supplied).

The instant case is analogous to *Jamieson* and *Fisher*. Like the plaintiffs in each of those cases, Petitioners were passengers in a moving vehicle targeted by police, and the officers were admittedly aware of the passengers' presence when they fired their weapons at the vehicle. (App. 27a & n.1). Thus, by intentionally shooting at a vehicle that they knew contained passengers, Bauer and Gooding effectively "seized" everyone inside the vehicle, including both Robinson and Waiters. The fact that Bauer and Gooding also considered them both to be criminal suspects only reinforces this conclusion. Thus, in holding that "stopping a vehicle's driver [did] not constitute a seizure of the passengers" (App. 15a-16a), the Eleventh Circuit made a ruling that squarely conflicts with *Jamieson* and *Fisher*, and review by this Court is needed to resolve a split in the circuits on the issue of whether a "seizure" occurs under these circumstances.

III.

The Decision Below Conflicts With The Prior Rulings Of This Court And Several Circuit Courts By Employing A Subjective "*Could* Have Believed" Standard To The "Objective Reasonableness" Inquiry Under § 1983.

The Eleventh Circuit's "objective reasonableness" analysis likewise conflicts with prior rulings of this Court and other circuits. In holding that Bauer's and Gooding's use of deadly force was "objectively reasonable" under the criteria set forth in *Graham*, the Eleventh Circuit applied a purely subjective standard, concluding that: (1) "a reasonable officer *could have* perceived that Hart posed a threat of serious physical harm," and (2) "Gooding and Bauer perceived that Hart was attempting to escape and *could potentially* endanger more lives." (App. 20a-21a) (emphasis supplied).

The prior rulings of this Court do not support the application of a "*could have believed*" standard. In *Graham*, this Court made clear that excessive force claims are evaluated under the Fourth Amendment's "objective reasonableness" standard. 190 U.S. at 395. Under this analytical framework, the reviewing court must determine whether a law enforcement officer's actions were objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer's intent or motivation. *Id.* at 396-97. Such a determination is based on the totality of the circumstances, including, *inter alia*: (1) whether the suspect posed an immediate threat to the safety of the officer or others; (2) whether the suspect was actively resisting arrest; and (3) the severity of the crime at issue. *Id.*

Further, in *Garner*, this Court held that the reasonableness of using deadly force to subdue a suspect hinges on whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either

to the officer or others." 471 U.S. at 11. Because there is no precise formula for determining the existence or non-existence of probable cause in the above context, the federal circuit courts have employed two divergent--and wildly inconsistent--approaches for assessing whether a law enforcement officer's use of deadly force was "objectively reasonable." The majority approach--known as the "*would have*" standard--requires a determination of whether a reasonable officer "*would have believed*" that the suspect posed a threat of serious physical harm, either to the officer or others. *See, e.g., Young v. City of Providence*, 404 F.3d 4, 23 (1st Cir. 2005); *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004); *Clem v. Corbeau*, 284 F.3d 543, 550 (4th Cir. 2002); *Jaffee v. Redmond*, 51 F.3d 1346, 1354 (7th Cir. 1995); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999).

The minority approach--and the one employed by the Eleventh Circuit--asks simply whether a reasonable officer "*could have believed*" that the suspect posed a threat of serious physical harm, either to the officer or others. *See Wilson v. Flynn*, 429 F.3d 465, 468 (4th Cir. 2005); *Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997); *Lowery v. Stovall*, 92 F.3d 219, 222 (4th Cir. 1996); *Pittman v. Nelms*, 87 F.3d 116, 120 (4th Cir. 1996); *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995); *Jones v. Webb*, 45 F.3d 178, 184 (7th Cir. 1995); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991).

These standards are not meant to be interchangeable,[1] for there is a world of difference between "would" and "could." *See United States v. Gaudin*, 28 F.3d 943, 963 & n.8 (9th Cir. 1994) (stating that the difference between the

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[1] Incredibly, the Eleventh Circuit has applied both standards, perhaps unaware that there is a distinction between "could" and "would." *Compare, Troupe*, 419 F.2d 1160, 1168-69 (11th Cir. 2005) (espousing "could have believed" standard), *with, Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005) (using "would have believed" standard), and *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (same).

two words is "substantial"), *aff'd*, 515 U.S. 506, 115 S.Ct. 2310 (1995). Whereas "could" refers to some probability of indeterminate size, "would" conveys something closely akin to more likely than not. *McFarlane v. Life Ins. Co. of North America*, 999 F.2d 266, 269 (7th Cir. 1993). *See also* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 Hastings L.J. 657, 665 (March 2005) (noting that the word "could" is used to express a mere possibility, whereas "would" requires significantly more than a tentative possibility).

The "*could have believed*" standard is a particularly inappropriate test for assessing "objective reasonableness" under § 1983, for it allows the defendant officer to escape liability simply because of the *mere possibility*--no matter how slight--that the suspect poses a serious threat of harm. Such a loose standard does violence to this Court's requirement in *Graham* of an "objective" inquiry into the officer's Fourth Amendment activities, and would allow the reviewing court to ignore conflicting evidence which tends to show that the suspect posed no serious threat of harm to the officer or others. Such an approach is especially problematic in the context of a motion for summary judgment under Federal Rule of Civil Procedure 56, where the evidence is to be viewed in the light most favorable to the nonmoving party.

If the Eleventh Circuit's approach were correct, then every police pursuit of a fleeing vehicle would give rise to a right to use deadly force against the driver of the vehicle out of a generalized concern for the welfare of other drivers or civilians who might be endangered. However, numerous circuits, including the Eleventh Circuit in a similar case, have rejected such a quantum leap of the right to use deadly force. *See Vaughan v. Cox*, 264 F.3d 1027, 1034 (11th Cir. 2001), *vacated by* 536 U.S. 953, 122 S.Ct. 2653 (2002), *reinstated and supplemented on remand*, 316 F.3d 1210 (11th Cir.), *vacated and superseded by*. 343 F.3d 1323 (11th Cir. 2003); *Haugen v. Brosseau*, 339 F.3d 857, 867-68 (9th Cir. 2003),

rev'd on other grounds, 543 U.S. 194, 125 S.Ct. 596 (2004); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999); *Acosta v. San Francisco*, 83 F.3d 1143 (9th Cir. 1996); *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993). Thus, the Eleventh Circuit's approach is in conflict with each of these decisions.

Rather than simply speculate whether the fleeing vehicle "*could have*" caused harm to the officer or others (as the Eleventh Circuit did in this case), the majority of circuits instead assess "objective reasonableness" by focusing on the speed of the vehicle and the officer's ability to avoid contact. *See, e.g.*, *Abraham*, 183 F.3d at 293-94 (reversing grant of summary judgment based on evidence that officer was not in front of the vehicle when she fired her weapon; bullet shattered driver's side window, rather than front windshield); *Brosseau*, 339 F.3d at 867-68 (reversing summary judgment based on evidence that the officer fired through driver's side window and fact that bullet entered driver's back near left shoulder blade); *Acosta*, 83 F.3d at 1146-47 (reasonable jury could conclude that officer who fired two shots at driver of vehicle used excessive force; disputed factual issues concerning speed of vehicle and officer's location at time of shooting); *Enyart*, 5 F.3d at 233-34 (fact question as to whether officer unreasonably created encounter by putting himself in path of vehicle precluded summary judgment).

The Eleventh Circuit's "objective reasonableness" analysis is in direct conflict with the Ninth Circuit's decision in *Brosseau*. There, the Ninth Circuit held that a police officer's use of deadly force against a suspected drug dealer, who had just "started pulling away" in a jeep, could be viewed by a jury as unreasonable based upon the location of the bullet-entry wound (i.e., in the back near the left shoulder blade) and evidence (including photographs of the jeep) indicating that the bullet entered through the rear side window. 339 F.3d at 862 & 67. The Ninth Circuit also characterized as insufficient the officer's contention that she

fired her weapon because she feared for the safety of "fellow officers" and "the community at large." Addressing this purported justification for shooting, the Ninth Circuit stated that "it is no more than 'a simple statement' of fear unsupported by objective factors." *Id.* at 868.[2]

The Eleventh Circuit's holding also conflicts with the Third Circuit's ruling in *Abraham*, where an off-duty police officer shot and killed an alleged shoplifter while he was attempting to escape in an automobile. Although the officer claimed that the fleeing suspect had attempted to "run him over" with the vehicle, the Third Circuit reversed the district court's grant of summary judgment in favor of the officer because the physical evidence, revealing that the bullet had entered the vehicle through the driver's side, could lead a reasonable jury to reject the officer's self-serving testimony:

> Although it is true that the security officers all testified that [the officer] was in front of the car, the fatal shot indisputably came through the driver's side window. . . . [This] hardly precludes a jury from finding that [the officer] fired from somewhere along the . . . side of the vehicle and that she was never in front of the vehicle. . . . Based on this physical evidence, a jury could reasonably decide to reject the security officers' testimony. Considering the physical evidence together with the inconsistencies in the officers' testimony,

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[2] Incredibly, the Eleventh Circuit misstates *Brosseau* as standing for the proposition that "it was objectively reasonable for [the officer] to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others." (App. 20a-21a). Contrary to the Eleventh Circuit's understanding of *Brosseau*, this Court, in *Brosseau*, actually "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself." 543 U.S. at 198.

> a jury will have to make credibility judgments, and credibility determinations should not be made on summary judgment.

183 F.3d at 293-94.

As the above cases plainly illustrate, the Eleventh Circuit made two critical errors when it assessed the issue of "objective reasonableness:" (1) it applied a subjective "*could have believed*" standard instead of the objective "*would have believed*" standard; and (2) it resolved all factual conflicts in the light most favorable to the officers, when, on a motion for summary judgment, all such conflicts should have been resolved in Petitioners' favor. Because of the inherent nature of a deadly force case, "courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story--*the person shot dead*--is unable to testify.'" *Abraham*, 183 F.3d. at 294 (citing *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Thus, a court "should not simply accept what may be a self-serving account by the police officer." *Id.* "It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Id.*

The evidence in this case--much of which was ignored by the Eleventh Circuit in its opinion--belies any notion that Hart's path of flight posed a serious threat to the officers or others. Numerous witnesses, including the lone civilian eyewitness, Regina Weatherington, testified that no officer was in front of or otherwise in the path of the moving vehicle when the shots were fired, and, further, that Hart's operation of the moving vehicle did not pose an immediate threat of death or serious bodily harm to the officers.

Similarly, no civilian was endangered by Hart's operation of the vehicle. Because the surrounding streets had been blocked off by law enforcement officers in advance of the SWAT operation, there was no vehicular or pedestrian traffic on Bahia Vista Street at the time of the incident. Equally important, Bauer, who fired the fatal shots and whose perspective is critical in assessing the alleged threat, testified that he did not observe any civilians in the immediate area.

In fact, the only person who claimed that he was endangered by the operation of the vehicle was Bauer. However, such a claim is contradicted by the following evidence: (1) Bauer's testimony that the vehicle was not traveling at a high rate of speed, and was still in the front yard of the residence when he fired his weapon; (2) Bauer's admission that the front of the vehicle had already passed him when he fired his weapon; (3) Bauer's statement that he "tracked" the driver with his firearm, suggesting careful deliberation on his part rather than a split-second decision; (4) Ms. Weatherington's testimony that no officer or civilian was in the path of the moving vehicle when Bauer fired the fatal shots; (5) the police photographs depicting bullet holes in the driver's side window and driver's side door of Hart's vehicle, indicating that the fatal shots were fired by Bauer while he was positioned on the driver's side of the vehicle and out of harms' way; and (6) the location of the bullet-entry wound in Hart's back, indicating that Bauer may have actually been positioned behind the vehicle when he fired. Based upon this conflicting evidence, there was a genuine issue of material fact as to whether Hart's actions posed a serious threat of physical harm to the officers or others.

In the face of this conflicting evidence, both the Eleventh Circuit and the District Court held (on summary judgment, no less) that the officers' use of deadly force was justified because the fleeing vehicle "*could have*" been a danger to others. (*See* App. 20a-21a). However, the mere

possibility that others might be harmed in the future does not rise to the level of the "immediate" threat contemplated by *Graham*; it is nothing more than pure conjecture and speculation as to how Hart might act in the future should he succeed in avoiding apprehension. Therefore, just as the Ninth Circuit, in *Brosseau*, held that a generalized statement of the possibility of harm to others is not enough to justify the use of deadly force, so, too, here, should Petitioners' excessive force claims be permitted to proceed to trial where both of the lower courts improperly used a subjective "could have believed" standard and there was evidence that Hart did not pose a serious threat of harm to any officer or civilian.

IV.

The Eleventh Circuit's Determination That A Suspect's Decision To Avoid Arrest Through Vehicular Flight Constitutes An Independent "Intervening" Cause Is In Direct Conflict With The Decisions Of Other Circuits.

In holding that the officers' use of deadly force was not the "proximate cause" of Robinson and Waiters' injuries, the Eleventh Circuit determined that "Hart's decision to continue his flight and his continued exercise of control over the Oldsmobile after he was shot 'was the *intervening* cause' of [Petitioners'] injuries." (App. 11a-13a). The Eleventh Circuit's holding is thus the first known instance in which a federal appellate court has espoused the view that a suspect's decision to avoid arrest through vehicular flight constitutes an "intervening" cause which breaks the chain of causation between an officer's use of deadly force to stop the vehicle and resulting injuries suffered by the vehicle's passengers.

If the Eleventh Circuit's view were correct, then *every* fleeing vehicle case (*i.e.*, officer shooting at a vehicle) would result in a finding of no liability based upon the lack of proximate causation. That cannot be so, for the federal

reporters are replete with cases, such as *Brosseau*, *Abraham*, *Enyart*, and *Acosta*, among others, where a § 1983 excessive force claim withstood a defense motion for summary judgment even though the suspect's decision to flee in a vehicle preceded the officer's decision to use deadly force. Even the Eleventh Circuit, in a similar case, has recognized this clear causal relationship. *See Vaughan*, 343 F.3d at 1332 (holding that officer was not entitled to summary judgment in § 1983 excessive force case despite Court's observation that "the danger presented by [driver's] continued flight was the risk of an accident during the pursuit.").

By focusing on Hart's continued flight after being shot, the Eleventh Circuit misapplied the tort law concept of "intervening" causes. In order for an "intervening" cause to relieve an alleged tortfeasor from liability, it must be a cause which could not have been reasonably foreseen or anticipated by the defendant. *See Guttierez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) ("a negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have 'directly' caused the harm."); *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990) ("The courts are quite generally agreed that foreseeable intervening causes . . . will not supersede the defendant's responsibility."); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1071 (2d Cir. 1996) ("an actor may be held liable for 'those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties.").

The Eleventh Circuit's "intervening cause" holding conflicts with the above decisions because it is reasonably foreseeable that fatally shooting the driver of a fleeing vehicle will cause the vehicle to crash, thereby injuring its occupants. This is such a straightforward proposition that it cannot possibly be disputed. *See, e.g.*, *Vaughan*, 343 F.3d at 1333 (stating, in a § 1983 case, that a reasonable police officer

would have known that firing weapon into cabin of speeding vehicle would cause the vehicle to crash); *Jaeger v. Petroni*, 133 Ariz. 174, 650 P.2d 476, 480 (Ariz. Ct. App. [Div. 2] 1982) (trial court erred in giving "intervening cause" instruction in passenger's action against driver of pursuing vehicle even though there was evidence that lead car's increased speed was direct cause of accident).

It is irrelevant, as well as a disputed factual issue, whether Hart remained in control of the vehicle or drove recklessly in the scant few seconds after being shot. After all, he had just been shot in the back by Bauer, and as the Florida Supreme Court noted in a similar vehicular shooting case, "[e]xperience and foresight support the conclusion that [the driver] engaged in such reckless conduct only because he was being chased by police, and that this misconduct would have ceased had the police discontinued the pursuit. There is nothing extraordinary in this conclusion. Accordingly, the issue may not be taken from the finder of fact." *City of Pinellas Park v. Brown*, 604 So.2d 1222, 1228 (Fla. 1992).

The shots fired by Bauer, in particular--which seriously wounded Hart--undoubtedly caused Hart to panic and flee the residence at a much higher rate of speed. Clearly, it is foreseeable--as well as logical--that the firing of a weapon under these circumstances will cause the driver to lose control of the vehicle, and, ultimately, crash. Had Bauer refrained from shooting, Hart would likely not have been incapacitated or lost control of his vehicle. To hold otherwise must necessarily assume that Hart's vehicle would have crashed at precisely the same time and location regardless of whether Bauer had used deadly force, a finding which is contradicted by evidence revealing that Hart accelerated only *after* being shot by Bauer, and that he died and lost control of the vehicle just prior to the crash. The fact that the vehicle crashed less than ten seconds after Hart was shot--0.3 miles from the scene--reinforces this conclusion.

Ultimately, however, this issue, like all questions of proximate causation, is more properly reserved for a jury, and should not have been decided on a motion for summary judgment. *See Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 127 (2d Cir. 1996) ("Questions regarding what is normal or foreseeable, like other questions of proximate cause, are generally issues for the trier of fact."); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984) ("the determination whether an independent and intervening act is sufficient to cut off the chain of causation is a factual issue."). Accordingly, the Eleventh Circuit's "intervening" cause determination, besides being contrary to the above precedent, was premature at this stage of the proceedings.[3]

V.

The Eleventh Circuit's "Qualified Immunity" Analysis Deviated From The Standard Articulated By This Court In *Saucier v. Katz* Because It Collapsed The "Objective Reasonableness" Inquiry Into Qualified Immunity And Credited The Officers' Version Of The Material Events.

In the "qualified immunity" portion of its opinion, the Eleventh Circuit disregarded this Court's precedent by *conflating* the qualified immunity analysis with the "reasonableness" inquiry. Specifically, in holding that Bauer and Gooding were entitled to qualified immunity, the Eleventh Circuit determined that the two officers acted

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[3] Further, in holding that Gooding's single "missed" shot was not the proximate cause of Robinson's and Waiters' injuries (App. 11a), the Eleventh Circuit ignored the § 1983 "supervisory liability" regime recognized in every circuit, including the Eleventh Circuit. *See, e.g., Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000); *Guttierez-Rodriguez*, 882 F.2d at 561. Under this framework, Gooding is liable, even though his shot missed, because he was Bauer's supervisor and participated in the subject incident.

"reasonably," and, in doing so, credited the officers' version of the events rather than view the evidence in the light most favorable to Petitioners, as instructed by *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). (App. 17a-22a).

In other words, the Eleventh Circuit "collapsed" the two inquiries into one, and, in doing so, undermined this Court's decision in *Saucier*. In *Saucier*, this Court enunciated a two-step inquiry for assessing qualified immunity under §1983. First, as a "threshold" question, the reviewing court must determine if the facts, "[t]aken *in the light most favorable to the party asserting the injury*," establish that the law enforcement officer's conduct violated a constitutional right. *Id.*, 533 U.S. at 201, 121 S.Ct. at 2156 (emphasis supplied). Second, if a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether that right was "clearly established." *Id.*

Saucier thus makes clear that the qualified immunity analysis is, and must remain, separate from the analysis of the substantive constitutional violation. However, instead of applying the *Saucier* analytical framework independently (and viewing the evidence in the light most favorable to Petitioners), the Eleventh Circuit evaluated the qualified immunity issue solely by reference to whether Bauer and Gooding acted "reasonably" from their perspective. (App. 17a-22a). Such an approach is inconsistent with *Saucier*, and has been sharply criticized by a number of federal appellate courts. *See, e.g.*, *Carr v. Castle*, 337 F.3d 1221, 1226 (10th Cir. 2003) (stating that "[i]n the past some courts addressing the subject of qualified immunity of law enforcement officers, particularly in the context of an alleged unconstitutional use of excessive force, had tended to conflate the qualified immunity inquiry with the constitutional inquiry. But *Saucier* . . . has corrected that perception."); *Bennett v. Murphy*, 274 F.3d 133, 137 (3d Cir. 2002) (stating that, in light of *Saucier*, "the immunity analysis is distinct from the merits of the excess force claim.");

Jones v. Wilhelm, 425 F.3d 455, 460-61 (7th Cir. 2005) ("It goes without saying that the reasonableness of an officer's actions is not a factor in determining whether the facts as alleged constitute a violation of constitutional rights" under *Saucier*).

The Eleventh Circuit's approach further undermined *Saucier* by crediting the officers' version of the events rather than--as is proper--the factual matrix most favorable to the Petitioners. For example, the Eleventh Circuit determined that "Bauer was directly in Hart's path" when he fired his weapon. (App. 20a). Such a finding, however, was contradicted by the following evidence adduced below: (1) Bauer's admission that the front of the vehicle had already passed him when he fired his weapon at Hart; (2) Bauer's admission that he "tracked" the driver with his firearm; (3) the sworn testimony of numerous witnesses stating that no officers or civilians were in the path of the moving vehicle when Bauer fired his weapon; (4) the bullet holes in the driver's side window and side-door, indicating that the fatal shots were fired by Bauer while he was positioned on the driver's side of the vehicle--even with the driver and out of harm's way--rather than from in front of the vehicle (as he later claimed); and (5) the location of the bullet-entry wound in Hart's back, indicating that Bauer was actually positioned well behind Hart--and not in front of the vehicle--when he fired his service revolver.

Saucier clearly states that the "threshold" question for purposes of qualified immunity is whether "[t]aken in the light most favorable to the party asserting the injury, *do the facts alleged show the officer's conduct violated a constitutional right*?" 533 U.S. at 201, 121 S.Ct. at 2156 (emphasis supplied). Despite *Saucier*'s clear mandate, the Eleventh Circuit cast aside conflicting evidence and viewed the alleged facts in the light most favorable to the defendant officers. By crediting the officers' evidence at the expense of Petitioners' conflicting evidence, the Eleventh Circuit paid mere lip service

to the "threshold" question enunciated in *Saucier*. *See, e.g.*, *Carr*, 337 F.2d at 1226-27 (stating that it "would do violence to *Saucier*" to view the evidence in the light most favorable to the defendant police officers).

Viewing the facts in the light most favorable to Petitioners, as is required under *Saucier*, the facts alleged by Petitioners establish that Bauer and Gooding committed a Fourth Amendment violation. The Fourth Amendment protects individuals from "unreasonable" seizures, and, in *Tennessee v. Garner*, this Court held that it is a violation of the Fourth Amendment for a law enforcement officer to use deadly force to seize a fleeing suspect who is unarmed, nondangerous and does not pose an immediate threat of harm to the officer or others. 475 U.S. at 11-12, 105 S.Ct. at 1701 ("[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . ").

Applying *Garner* to this case, the use of deadly force by Bauer and Gooding was in contravention of Petitioners' Fourth Amendment rights in light of the following evidence: (1) Hart's vehicle was still in the front yard, as opposed to a public roadway or street, when the two officers fired their weapons; (2) the occupants of the vehicle were unarmed; (3) the vehicle was "maneuvering away" from Gooding when he fired his weapon; (4) Gooding shot at the vehicle solely to prevent a prolonged flight, and not because of any imminent threat; (5) Bauer conceded that he fired his weapon solely out of concern for his own safety, yet the front of the vehicle had already passed him when he fired his weapon; (6) the bullet entered Hart through his back, suggesting that Bauer fired from behind the vehicle; (7) there were no other officers within 20 feet of the vehicle; and (8) there were no civilians in the immediate vicinity due to the presence of roadblocks. Under these facts, which must be accepted as true for

purposes of *Saucier*, a jury could easily conclude that Bauer and Gooding violated Petitioners' Fourth Amendment rights.

VI.

This Court's Decision In *Tennessee v. Garner* Provides Fair Notice That It Is A Violation Of The Fourth Amendment To Use Deadly Force Against An Unarmed Suspect Fleeing In An Automobile Where The Suspect Poses No Immediate Threat Of Serious Harm To The Officer Or Others.

The Eleventh Circuit's opinion does not address the second prong of *Saucier*--whether the alleged constitutional right was "clearly established" at the time of the subject incident. The District Court, however, did specifically address that issue and held that this Court's decision in *Garner* "did not give Gooding and Bauer fair warning that shooting at the fleeing vehicle and its driver under these circumstances would clearly violate federal law." (App. 54a).[4] Since the entry of the District Court's order, however, this Court decided *Brosseau* and stated that while *Garner* is cast "at a high level of generality," 543 U.S. at 199, it is not *per se* unavailable for use in demonstrating that the law was "clearly established" merely because an automobile is involved.[5] Rather, as this Court expressly acknowledged in its *Brosseau* opinion, *Garner* can still apply in an "*obvious* case," even where "novel factual circumstances" are involved. *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508 (2002)).

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[4] In *Garner*, this Court held that it is a violation of the Fourth Amendment for a law enforcement officer to use deadly force to seize a fleeing suspect who is unarmed, nondangerous, and does not pose an immediate threat of harm to the officer or others. 471 U.S. at 11, 105 S.Ct. at 1701.

[5] To hold otherwise would essentially limit the Supreme Court's holding in *Garner* to cases where the suspect flees "on foot." *Garner* contains no such limitation, and there is no basis for creating such a distinction.

In the vehicular context, an "obvious case" permitting *Garner*'s use would be one where the fleeing suspect did not pose an immediate threat of death or serious harm to the officer or others. *See Brosseau*, 543 U.S. at 200. 125 S.Ct. at 600 ("[t]he parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon set on avoiding capture through vehicular flight, when persons in the *immediate* area are at risk from that flight.") (emphasis supplied). *See also Harris v. Coweta County, Ga.*, 433 F.3d 807, 819 & n.5 (11th Cir. 2005) (holding in the context of a high-speed vehicular pursuit that "[w]ithout the existence of an *immediate* threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with 'obvious clarity.'") (emphasis supplied); *Vaughan*, 343 F.3d at 1332-33 ("appl[ying] *Garner* in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to the police officer or others).

Brosseau did not present such a factual scenario, as this Court characterized it as offering "far from the obvious [case] where *Graham* and *Garner* alone offer a basis for decision." 543 U.S. at 199, 125 S.Ct. at 500. In *Brosseau*, the officer believed that the suspect had a gun and had probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area (including a woman and her three-year-old child parked in a small car only four feet away from the suspect's vehicle, and two men in a parked car nearby). 543 U.S. at 196-97, 125 S.Ct. at 597-98. In addition, the *Brosseau* Court noted that the suspect [Haugen] had pleaded guilty to a felony resulting from his attempted flight from the scene. *Id.*, 543 U.S. at 197, 125 S.Ct. at 598 ("By so pleading, he admitted that he drove his jeep in a manner indicating a 'wanton or willful disregard for the lives of . . . others.'").

Here, by contrast, there is no comparable evidence that Bauer or Gooding had probable cause to believe that Hart posed an immediate risk of death or serious bodily harm to any officer or civilian. Whereas *Brosseau* involved several civilians (including a woman and her three-year-old child) within several feet of the suspect's vehicle, there were *no* civilians in the immediate surrounding area in this case because of the police roadblocks that had been set up outside the residence. Further, numerous witnesses testified that no officer or civilian was in the path of, or otherwise endangered by, Hart's vehicle at the time Bauer applied deadly force. According to Bauer, no officer was within 20 feet of the vehicle when he shot Hart. In addition, all three occupants of the vehicle were unarmed. Further, in contrast to *Brosseau*, the driver in this case (Hart) did not plead guilty to a felony or any other crime arising out of his attempted flight; instead, he was executed by the officers right on the spot. The fact that this case is very different from *Brosseau* permits the conclusion that *Garner*, by itself, clearly establishes the right at issue here. Thus, the District Court's decision is at odds with *Brosseau*.

VII.

The District Court's Dismissal of Petitioners' § 1983 "Municipal Liability" Claims Conflicts With The Principles Recognized in Nearly Every Circuit.

The Eleventh Circuit's opinion did not address Petitioners' claims of "municipal liability" under § 1983. The District Court, however, did address them in its opinion, and dismissed Petitioners' claims of § 1983 municipal liability predicated upon the following theories: (1) persistent failure to discipline, (2) ratification, and (3) failure to train.

A. "Failure to Discipline" Claim

In rejecting Petitioners' "failure to discipline" claim, the District Court placed undue emphasis on the fact that Gooding and Bauer were exonerated by the Sheriff's own investigators, and were not charged criminally by outside law enforcement agencies. (App. 68a-72a). Notably, the District Court did not address the Sheriff's persistent failure to take disciplinary action in other officer-involved shooting incidents, limiting its analysis only to the investigation of this particular incident. Because of its overly narrow focus, the District Court ignored compelling evidence from other similar investigations--spanning a ten-year period---which revealed the Sheriff's deeply flawed "accountability" system.

It is well-settled that a persistent failure to take disciplinary action against officers can give a rise to a "policy" or "custom" for which § 1983 municipal liability can attach within the meaning of *Monell*.[6] At least nine circuit courts of appeal have held that municipal liability may be imposed based on a "failure to discipline" police officers. *See, e.g.*, *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir. 1983); *Colbin v. Upper Darby Township*, 838 F.2d 663, 672 (2d Cir. 1988); *Spell v. McDaniel*, 824 F.2d 1380, 1392 (4th Cir. 1987); *McKenna v. City of Memphis*, 785 F.2d 560, 561 (6th Cir. 1986); *Jones v. City of Chicago*, 787 F.2d 200, 207 (7th Cir. 1986); *Harris v. City of Pagedale*, 821 F.2d 499, 501-07 (8th Cir. 1987); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1992); *Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988). The dangers of such a municipal custom cannot be overstated. It creates a system in which an officer's use of deadly force against a civilian will

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[6] *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978) (declaring that municipality can be held liable under § 1983 if the plaintiff shows that a "policy" or "custom" of the municipality was the moving force behind the constitutional deprivation).

almost always be automatically upheld regardless of the facts and circumstances of the particular incident. Such a custom is tantamount to a "tacit authorization" of police misconduct.

The disciplinary apparatus of the Sarasota County Sheriff's Office evinced a complete lack of police officer accountability. Sheriff Monge admitted in his deposition that of the 20 to 30 officer-involved shooting incidents that occurred during his fifteen-year tenure as the Sarasota County Sheriff, *none* resulted in a finding of an "improper" or "excessive" use of force. Likewise, Lieutenant Kenneth Crepeau, who was in charge of the Internal Affairs division of the Sheriff's Office, confirmed that "no complaint found to have merit was made against [any] Sarasota County Sheriff's deputy from 1992 to September 30, 1999" which involved the use of deadly force with a firearm or motor vehicle.

The District Court's Order makes no mention of the lax disciplinary history of the Sheriff's Office, instead limiting its inquiry to how this particular incident was investigated. Such a narrow focus ignores the view espoused by a majority of circuits that "a *persistent* failure to discipline" police officers can give rise to an inference that a municipality has ratified conduct, thereby establishing a "custom" within the meaning of *Monell*. *See Batista*, 702 F.2d at 397; *Fundiller*, 777 F.2d at 1443. Thus, in assessing Petitioners' "failure to discipline" theory of municipality liability, the District Court was necessarily required to consider evidence of the Sheriff's other prior investigations.

Indeed, numerous courts, in denying a municipality's motion for summary judgment on a "failure to discipline" claim, have pointed to the poor disciplinary track record of the municipality. *See, e.g.*, *Samples v. City of Atlanta, Ga.*, 846 F.2d 1328, 1333 (11th Cir. 1988) (denying city's motion for summary judgment based on evidence that "an extremely low percentage" of excessive force claims filed against the

police were sustained); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986) ("Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force."); *McCray v. City of Dothan*, 169 F.Supp.2d 1260, 1284 (M.D. Ala. 2001) (evidence that, in the ten years preceding incident, only one out of twenty-nine excessive force complaints were found to have merit deemed sufficient to withstand city's motion for summary judgment), *aff'd in part, reversed in part* (11th Cir. 2003); *Kindle v. City of Harvey*, 2002 WL 230779, *3 (N.D. Ill. 2002) (denying city's motion for summary judgment based on evidence that in five years preceding the incident, no complaints alleging excessive force were sustained).

Based on the fact that there have been approximately 20-30 shooting incident investigations since 1989, and not one of them has resulted in a finding of excessive force or even minor discipline imposed against the officer involved, it can reasonably be inferred that the Sheriff had a policy and custom of ignoring excessive force violations. *See Robinson v. City of Harvey*, 2001 U.S. Dist. LEXIS 1930, *18-25 (N.D. Ill. 2001) (denying city's motion for summary judgment based on absence of discipline in past incidents; the court held that "the fact that 24 investigations of excessive force complaints filed between 1995 and 1997 resulted in no discipline could lead a factfinder to the conclusion that the City had a policy of ignoring excessive force violations.").

B. "Failure to Train" Claim

In rejecting Petitioners' "failure to train" theory of §1983 municipal liability, the District Court concluded that the deadly force training provided to SWAT officers by the Sheriff's Department was "adequate." (App. 76a). However, this conclusion is at odds with the testimony of no fewer than six Sarasota County law enforcement officers, including

Bauer and Gooding, all of whom admitted that the Sheriff did not provide *any* training to its officers regarding the use and limitations of deadly force during motor vehicle pursuits.

Under similar circumstances, courts have held that a municipality's failure to provide training in the use and limitations of deadly force, especially as it pertains to moving vehicle pursuits, constitutes the requisite "deliberate indifference" to subject the municipality to liability. *See, e.g.*, *Kibbe v. Thurston*, 777 F.2d 801, 806-09 (1st Cir. 1985) (jury could reasonably conclude that municipality's failure to train officers in how to conduct high-speed chases constituted "deliberate indifference"); *Cooper v. Merrill*, 736 F. Supp. 552, 566-69 (D. Del. 1990) (denying municipality's motion for summary judgment where plaintiff adduced evidence that officers received no training in shooting at moving vehicles); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (failure to train officers on subject of high-speed pursuits can be characterized as "deliberate indifference").

For example, in *Cooper*, the plaintiff argued that a municipality provided no training to its officers regarding the use of deadly force during vehicular pursuits. In support of his contention, plaintiff relied on a single officer's testimony that he had not received any training in shooting at moving vehicles. The Court concluded that this evidence presented a genuine issue of material fact as to plaintiff's failure to train claim, and thus denied the municipality's motion for summary judgment, explaining:

> [t]here is a genuine dispute between the parties regarding the existence of any adequate training. [Officer] Magaw testified that [the municipality's] officers participated in a number of pursuits, but there was no policy, procedure or training regarding such

> situations. . . . The Court therefore concludes that summary judgment is not appropriate.

736 F. Supp. at 568.

Likewise, in *Kibbe*, plaintiff, the legal representative of a decedent who was shot and killed by police during a vehicular pursuit, brought a "failure to train" claim against a municipality, arguing that the municipality provided virtually no training to its officers in apprehending suspects fleeing in a vehicle. The case was tried to a jury, and the jury found for the plaintiff. The First Circuit affirmed the trial court's denial of the municipality's motion for judgment notwithstanding the verdict, concluding that there was sufficient evidence of the city's failure to train its officers in the use of deadly force during motor vehicle pursuits to support the jury's finding:

> Although evidence on the [municipality's] training practices was sparse, the testimony of two officers indicated that the [municipality] gave officers virtually no guidance in apprehending suspects fleeing in motor vehicles who ignored orders to stop. . . .

777 F.2d at 807-08.

Here, Petitioners presented more evidence of the lack of training than plaintiffs adduced in either *Cooper* or *Kibbe*. Rather than relying on the testimony of just one or two officers, Petitioners cited the deposition testimony of no less than six law enforcement officers, including Bauer, Gooding, several training instructors, and the Sheriff himself. Such testimony was more than sufficient to create a genuine issue of material fact regarding the adequacy of the SWAT officers' training.

Since this was a motion for summary judgment, and there is conflicting evidence, the District Court should not have credited the self-serving affidavit testimony cited by the Sheriff over the contradictory evidence supplied by Petitioners. At this stage of the proceedings, all inferences and reasonable doubts about the facts should have been resolved in Petitioners' favor.

CONCLUSION

For all of the foregoing reasons, Petitioners Dianne Troupe and Leon Waiters, Jr. respectfully request that the Supreme Court of the United States grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

[DATED AND DECIDED ON AUGUST 3, 2005]

No. 04-10550

D. C. Docket No. 02-00053-CV-T-24-MAP

DIANNE TROUPE, as Personal Representative, for the Estate of Ricardo Robinson, deceased,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, et al.,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

No. 04-10563

D.C. Docket No. 02-00054-CV-T-24-MAP

LEON WAITERS, JR.,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, SARASOTA COUNTY SHERIFF'S DEPARTMENT, a political subdivision of the State of Florida,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(August 3, 2005)

Before TJOFLAT and KRAVITCH, Circuit Judges and LIMBAUGH* District Judge,

KRAVITCH, Circuit Judge:

In two cases, consolidated on appeal, Plaintiff-Appellant Dianne Troupe, as personal representative for the estate of Ricardo Robinson, deceased, and Plaintiff-Appellant, Leon Waiters, Jr. (collectively "the plaintiffs") appeal the district court's grant of summary judgment in favor of Sarasota County, Sheriff Geoffrey Monge, Sheriff William F. Balkwill, Deputy Kevin L. Gooding, and Deputy Timothy L. Bauer (collectively "the defendants") in their 42 U.S.C. § 1983 action based on alleged excessive force by police officers.

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*Honorable Stephen N, Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation

I. Facts

On the morning of September 30, 1999, the Sarasota County Sheriffs Office Special Weapons and Tactics ("SWAT") Team prepared to serve a felony drug arrest warrant for Ryan Hart ("Hart") and a search warrant for Hart's residence located at 2459 Bahia Vista, Sarasota, Florida ("the residence"). Defendant Captain Kevin L. Gooding ("Gooding") was the leader of the SWAT Team. Sixteen other SWAT members, including Defendant Timothy L. Bauer ("Bauer"), reported for the scheduled briefing.

The Special Investigation Bureau ("SIB") detectives working with the FBI violent crimes task force went over information about Hart. The SWAT Team was told that Hart was a 27-year old male with 40 previous arrests and 19 convictions. They were informed that Hart was out on bond for attempted murder and was known to run from the police and for his violent tendencies. Gooding then briefed the Team on the tactical plan for executing the warrants and gave out individual assignments. The Team, dressed in full

SWAT gear, then moved to an area near Hart's home to prepare for the execution of the warrants. The surrounding streets near the residence were blocked off by Sarasota County law enforcement personnel.

A surveillance report issued while the team was en route indicated that Hart and two other males-later identified as Robinson and Waiters-had exited the house and were approaching a four door black Oldsmobile ("the Oldsmobile") parked in the driveway. Gooding and the driver of the SWAT Team van drove their vehicles into positions blocking the Oldsmobile's exit from the driveway. Hart and the two men entered the car and locked the doors.

The SWAT Team, with their guns drawn, surrounded the Oldsmobile, and yelled commands for Hart and the passengers to open the doors and surrender. Gooding attempted to open the driver's door and another Deputy attempted to open the front passenger door, but both doors remained locked. The other officers continued to yell commands such as "Sheriffs department, hands up, hands

up, get out of the vehicle," but none of the passengers complied. The Oldsmobile then began to move, with Hart as the driver, revving the engine loudly and the car jerking backwards and forwards.

When the incident occurred, Regina Weatherington ("Weatherington"), a cable splicer for Verizon, was working up approximately 25 feet high on a telephone pole located across the street. She had a clear view of the entire incident. Weatherington's testimony indicates that "the car would move fast-quickly, and stop quickly, and move fast again. Stopping quickly," She testified that the uniformed "policemen had the car surrounded with their bodies" and that she was surprised that no one got hit.[1]

Gooding claimed that he heard a change in the tone of the SWAT Team members' voices as the Oldsmobile moved, "like they were in extreme danger where they were." He stated that he "felt a very pressing need at that

moment in time to cause that driver to stop doing what he was doing with that car" because his officers were in serious danger and "at risk for loss of life and limb." Thus, he raised his weapon, but did not shoot the driver because he felt he might harm other SWAT Team members who were in the line of fire. Suddenly, the Oldsmobile made a hard left such that the car was now facing the road. Gooding, believing that he had an opportunity to "disable the car," fired a single shot at a low angle, aiming for the lower portion of the tire. The shot missed the tire and, apparently, did not strike anyone or anything.

Soon thereafter, Bauer saw the car coming directly at him and believed it would run right through him in order to leave the scene. He aimed his weapon and fired two shots at the driver of the Oldsmobile and jumped out of the way as the car swept past him. One bullet struck the driver's door

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[1] The plaintiffs contend that Hart did not hit any of the officers in the struggle. Corporal Mike Kennedy claims that his foot was run over by the rear tire and Deputy Randall Butsch claims that the car struck him in the left leg.

just above the keyhole. The other bullet went through the driver's side window and hit Hart in the back.[2]

Hart then accelerated the car out of the yard, made a left turn onto Bahia Vista, and headed west for over 0.3 miles. The Oldsmobile maneuvered through the intersection of Shade and Bahia Vista without slowing. It then approached an officer's unmarked vehicle, slowed down, made a sharp move to the right to avoid oncoming traffic from the left, and went onto the grass and sidewalk, crashing into a concrete wall. Hart was pronounced dead at the scene. Robinson, the front seat passenger, was also pronounced dead at the scene. The backseat passenger, Waiters, sustained blunt force trauma injuries to the skull, and was transported via helicopter to a hospital for emergency medical treatment.[3]

After the completion of internal investigations which exonerated the officers from any wrongdoing, the plaintiffs

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[2] None of the shots hit either Robinson or Waiters.

[3] Waiters remained in a coma for two and a half months following the incident

filed suit in Florida State court. The defendants subsequently removed the case to federal district court. Pursuant to § 1983, the plaintiffs alleged: Excessive Force by Defendants Gooding and Bauer (Count I); Failure to Protect Decedent from Unconstitutional Harm by Defendants Gooding and Bauer (Count II); Supervisory Liability by Defendant Gooding (Count III); and Municipal Liability by Defendant Sarasota County and Defendant Sheriff Balkwill (Count IV).[4] Each defendant moved for summary judgment. The district court granted summary judgment on all counts.

In this appeal, we address whether the district court erred in finding that (1) the defendants were not the proximate cause of the plaintiffs' injuries; (2) the

[4] The plaintiffs also asserted several state law claims. Because the district court dismissed plaintiffs' federal law claims in their entirety, the district court declined to exercise supplemental jurisdiction over plaintiffs' state law claims. The state law claims were remanded to state court and thus are not at issue on appeal.

defendants' use of deadly force was reasonable under §1983; and (3) the defendants were entitled to qualified immunity.[5]

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo applying the same standard as the district court. *Korman v. HBC Fla., Inc.*, 182 F..3d 1291, 1293 (11th Cir. 1999). We draw all inferences in favor of the non moving party. *Id. See also Robinson v, Arrugueta*, No. 04-10856 *2 (11th Cir. 2005).

B. The Defendants Were Not the "Proximate Cause" of the Plaintiffs' Injuries.

A § 1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986), Recovery of damages is limited to those injuries proved to be caused by

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[5] We affirm, without discussion, the judgment of the district court with regard to the remaining issues on appeal. *See* 11th Circuit Rule 36-1, Thus, we conclude that (1) Gooding was not liable under § 1983 for supervisor liability; and (2) the Sheriff was not liable under § 1983 for municipal liability.

the defendants. *See Whiting v. Traylor*, 85 F.3d 581, 586 n.10 (11th Cir. 1996) (holding in a malicious-prosecution case against arresting officers that the chain of causation could be broken by the prosecutor). The district court concluded that Bauer and Gooding were not the proximate cause of the plaintiffs' injuries because it determined that Hart's continued flight after being shot by Bauer constituted an independent "intervening" cause.

For the following reasons, we conclude that the district court did not err in making this determination. First, Gooding fired only one shot and it completely missed striking the car or any of its passengers. Thus, Gooding's single-missed shot was not the proximate cause of any injury to Robinson and Waiters. Hart's decision to continue his flight and his continued exercise of control over the Oldsmobile after he was shot,[6] "was the intervening cause"

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6 Specifically, Gooding points to the following evidence for support that Hart exerted control over the Oldsmobile after he was shot:

> (1) Hart drove the vehicle out of the yard onto Bahia Vista Street overshooting the westbound lane, going into the eastbound lane, then quickly turning back into the westbound lane; (2) As Hart

of Robinson and Waiters' injuries. The fact that Hart ultimately died from the gunshot wound fired by Bauer does not erase the acts and decisions that Hart made after the shooting and up to the time of his death." The causal relation does not exist when the continuum between Defendant's action and the ultimate harm is occupied by the conduct of deliberative and autonomous decision-makers." *Dixon v. Burke County,* 303 F.3d 1271, 1275 (11th Cir. 2002). Hart began implementation of his escape before deadly force was applied. His reckless driving preceded any shots, continued as shots were taken, and continued after the shots were fired. Thus, Hart's determination to flee was not

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drove west on Bahia Vista he rapidly accelerated his car to a speed of 60 to 70 MPH; (3) As the Oldsmobile approached the slower traveling unmarked car of Detective Wallace also in the westbound lane of Bahia Vista, the brake lights of the Oldsmobile came on and the Oldsmobile slowed down; (4) The Oldsmobile initially attempted to go around Detective Wallace's car on the left but was blocked by eastbound traffic. The Oldsmobile then made a sharp turn to the right back into the westbound lane; (5) The Oldsmobile then moved to the right of Wallace's vehicle going up on the sidewalk and hitting a concrete wall and then a concrete pole. Just prior to impact, Wallace saw the car's wheels turn "Like somebody was trying to get back into Bahia Vista" and Deputy Shaw observed the car make a sudden movement to the left and the vehicle's brake lights come on just before impact before impact.

a reaction to the force used by Bauer or the other Officers. Instead, Hart's behavior prior to the shots establishes that he had no intention to drive safely regardless of whether shots were fired. Thus, the district court did not err in concluding that it was Hart's reckless driving that caused the death and injury of the plaintiffs and not Bauer's decision to use deadly force.

C. The District Court Erred in Finding A Fourth Amendment Seizure of Robinson and Waiters.

The plaintiffs allege that Gooding and Bauer used excessive force in violation of their Fourth Amendment right to be free from unreasonable searches and seizures. To assert a Fourth Amendment claim based on the use of excessive force, the plaintiffs must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable. *See Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997). The district court found that a Fourth Amendment seizure of Robinson and Waiters occurred when

"Gooding fired at the Oldsmobile and Bauer fired at Hart in an attempt to stop the car." We disagree.

"[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement. . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement. . . but only when there is a governmental termination of freedom of movement through *means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 1381, 103 L,Ed.2d 628 (1989) (emphasis in original). "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990).

Force regardless of the form directed to a driver of a vehicle-particularly one attempting to flee-does not give rise to a due process deprivation claim unless it was exercised with "a purpose to cause harm" unrelated to the legitimate object of arrest. *Id.* The plaintiffs concede that shots were

fired at the driver as he "began to drive parallel to the residence proceeding out of the circular driveway" in an "attempt to stop [the car] from leaving the residence." The plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest.

Furthermore, Gooding's attempt to seize Hart by firing at the tire of the Oldsmobile was not a seizure. "[N]either usage nor common-law tradition makes an *attempted* seizure a seizure." *California v. Hodari D.*, 499 U.S. 621, 626 n.2, 111 S.Ct. 1547, 1551 n,2, 113 L.Ed.2d 690 (1991) (emphasis in original). Additionally, stopping a vehicle's driver does not constitute a seizure of a passenger. *See County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 1715, 140 L.Ed.2d 1043 (1998), *citing Brower*, 489 U.S. at 596-97. Thus, when Bauer shot Hart that did not constitute a seizure of the passengers. Therefore, the district court erred when it found that Gooding and Bauer seized the occupants of the vehicle.

Nonetheless, we note that although the district court found that a seizure occurred it also found that the force used to effect the seizure was reasonable. Thus, though we disagree that a seizure occurred, we agree with the district court's final assessment that the plaintiffs did not establish an excessive force claim.

D. The Defendants were Entitled to Qualified Immunity.

Even if Gooding and Bauer had seized Robinson and Waiters with unreasonable use of force, the district court correctly found that they were entitled to qualified immunity, In *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), the Supreme Court set out a two-step analysis to determine whether an officer is eligible for qualified immunity. The first step is to determine whether the facts "[t]aken in the light most favorable to the party asserting the injury,... show the officer's conduct violated a constitutional right[.]" *Id.* If the conduct did not violate a constitutional right, the inquiry ends there. If the conduct violated a constitutional right, a court must move on to the

second step and determine "whether the right was clearly established." *Id. See also Robinson*, No. 04-10856 *2.

The Fourth Amendment protects individuals from 'unreasonable" seizures. As we recently explained in *Robinson*,

> Deadly force is "reasonable" for the purposes of the Fourth Amendment when an officer "(1) 'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm'; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force; if feasible." *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (11th Cir. 2003)[7] (quoting *Tennessee v. Garner*, 47 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)); *see also Crosby v. Monroe County*, 394 F.3d 1328, 1333 (11th Cir. 2004) ("the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.").

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[7] In *Vaughan*, this Court held that a reasonable jury could conclude that an officer used excessive force against a passenger in a moving vehicle when there was evidence that the driver led police on a high-speed chase at speeds approaching 90 MPH and when there was a factual question of whether the suspect made any motion in the direction of hitting the officer or putting other lives in danger.

Robinson, No. 04-10856 *2.

The district court determined that the force Gooding and Bauer used under the circumstances was reasonable. The court found that if Hart's escape had been successful, his path of flight "could have posed" a threat of death or serious injury to the public or to other members of the SWAT Team. The plaintiffs argue that the mere possibility that others may be harmed is not enough to justify the use of deadly force, asserting that there must be an immediate and justifiable threat of harm. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). The plaintiffs contend that numerous witnesses testified that no law enforcement officer or civilian was in the path of the Oldsmobile when the shots were fired.

Although the facts must be taken in the light most favorable to the plaintiffs, the determination of reasonableness must be made from the perspective of the officer:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation,

Menuel v. City of Atlanta, 25 F.3d 990, 996 (11th Cir. 1994), quoting Graham, 490 U.S. at 396-97.

Here, the SWAT Team surrounded the Oldsmobile, and Hart was disobeying their clear orders to put his hands up and surrender. The Oldsmobile suddenly moved forward and backward and the Officers had to make split-second decisions of whether they could escape before anyone suffered serious injury. In their briefing earlier, they were told that Hart was dangerous and had tried to escape from police before and would likely be carrying a weapon. Additionally, the three officers surrounding Hart's car, and a fourth in the yard all separately concluded that deadly force was needed and appropriate to stop Hart, but they did

not shoot because they did not have a clear shot and were worried about a cross-fire situation. Bauer was directly in Hart's path as the Oldsmobile accelerated toward him. He had only 3-5 seconds to assess the situation before shooting. Even if in hindsight the facts show that the SWAT Team could have escaped unharmed, a reasonable officer could have perceived that Hart posed a threat of serious physical harm.

In *Brosseau v. Haugen*, - U.S. - 125 S.Ct. 596, 600, 160 L.Ed.2d 583 (2004), the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. In *Brosseau*, like the present case, the Officer fired through the driver's side window and the bullet entered the driver's back. 125 S.Ct. at 598. Here, Gooding and Bauer perceived that Hart was attempting to escape and could potentially endanger more lives and thus, Bauer shot through the driver's side window and hit Hart in the back. Because the *Brosseau* Court held

that it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening to escape and cause harm to others, and because of the similarities of these two cases,[8] the district court did not err in finding that the officers' conduct did not violate a constitutional right and that Gooding and Bauer were entitled to qualified immunity.[9] Finally, because our inquiry ends at the first step,

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[8] In *Brosseau,* citizens and other officers were in the immediate area and were at a high risk of harm if the suspect had escaped. *Id.* In the present case, the streets were blocked, which created less possibility of harm to innocent citizens. Nonetheless, the Oldsmobile was surrounded by Officers who were at risk and the car did end up breaking out of the driveway and getting onto a main road. Bauer was aware at the time of the shooting that other surveillance officers were only a short distance away. He also knew that citizens could be on the main street and could be harmed. Thus, Bauer believed there was an immediate risk of harm to the general public.

[9] We note that this case is distinguishable from *Harris v. Coweta County,* 406 F.3d 1307 (11th Cir. 2005). Under the first prong of the *Saucier* analysis, the *Harris* panel concluded that Harris was seized by Scott, a ticketing officer, when Scott rammed his vehicle into Harris's vehicle and that the use of deadly force was unreasonable. *Id.* At 1315-17. The Court stressed that "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase pose an imminent threat of serious physical harm to Scott or others." *Id.* at 1316. Harris's only crime was speeding. *Id.* In contrast, Hart, in the case *sub judice*, had 40 previous arrests and 19 convictions. The officers were informed that Hart was out on bond for attempted murder and was known to run from the police and for his violent tendencies. Hart bumped his car into one officer before the shooting and ran over the foot of another. Thus, these cases are distinguishable

we need not determine whether the law was clearly established at the time of the incident. *Saucier*, 533 U.S. at 201.

III. CONCLUSION

For the reasons stated above, we conclude that the district court did not err in granting summary judgment in favor of the defendants.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[FILED ON JANUARY 22, 2004]

DIANE TROUPE, as Personal Representative for the Estate of Ricardo Robinson, deceased,

Plaintiff,

Case No. 8:02-cv-53-T-24MAP

v.

SARASOTA COUNTY, FLORIDA, WILLIAM F. BALKWILL, KEVIN L. GOODING, and TIMOTHY L. BAUER,

Defendants.

ORDER

This cause comes before the Court on the following motions: Defendant Sarasota County's ("the County") Motion for Summary Judgment (Doc. No. 123); Defendant William F. Balkwill's ("Balkwill") Motion for Summary Judgment (Doc. No. 125); Defendant Timothy L. Bauer's Motion for Summary Judgment (Doc. No. 128); and Defendant Kevin L. Gooding's

Motion for Summary Judgment (Doc. No. 131). Plaintiff has filed responses in opposition to each of these motions for summary judgment.

I. Factual Background

On September 29, 1999, the Sarasota County Sheriff's Office ("SCSO") obtained three felony arrest warrants for Ryan Hart ("Hart") and a search warrant for Hart's residence located at 2459 Bahia Vista, Sarasota, Florida ("the residence"), including people found therein, the curtilage, and cars found therein (Doc. No. 134, Tab 3, Exh. A-D). The SCSO, working in conjunction with a Federal Bureau of Investigation ("FBI") multi-jurisdictional violent crimes task force, identified Hart as a suspect in numerous drug sales (Doc. No. 134, Gooding Dep., p. 9-10). Prior to the issuance of the warrants, Hart had participated in a series of undercover drug transactions (Doc. No. 134, Gooding Dep., p. 7). Because Hart was known to run from the police, was out on bond for attempted murder, and

had shown violent tendencies, the SCSO informed its Special Weapons and Training ("SWAT") team that its services were needed for the service of the warrants (Doc. No. 152, Tab No. 58, Mayer CIB Statement).

On September 30, 1999, the SWAT team of the SCSO prepared to serve the warrants. Defendant Deputy Kevin L. Gooding ("Gooding") led the SWAT team. At the SWAT team briefing, the SCSO Special Investigation Bureau ("SIB") detectives working with the FBI violent crimes task force discussed the objectives of the operation, Hart's criminal background, and his propensity to flee (Doc. No. 134: Bauer Dep., p. 132-35; Butsch Dep., p. 39; Kennedy Dep., p. 19-20; McElyea Dep., p. 21-23). During this first portion of the briefing, the SWAT team members were given photographs of Hart and a copy of Hart's criminal history (Doc. No. 134: Bauer Dep., p. 132; Butsch Dep., p. 40). The second part of the briefing addressed the tactical plan for executing the warrants

and the individual assignments within that tactical plan (Doc. No. 134, Butsch Dep., p. 41-43). The entire SWAT team briefing lasted approximately 30-45 minutes (Doc. No. 134, Kenney Dep., p. 11). During this briefing, at approximately 10:00 a.m., the SWAT surveillance team reported by radio to Gooding that Hart had left the residence, gotten into a four door black Oldsmobile ("the Oldsmobile") parked outside the residence, and driven away from the residence (Doc. No. 134, Gooding Dep., p. 36). Upon completion of the briefing, the SWAT team members donned their olive green SWAT uniforms and black vests with "SHERIFF" printed in large white letters on the front and back (Doc. No. 134, Tab 2, Kenney Aff.).

Following the briefing, the SWAT surveillance team informed Gooding that the Oldsmobile had returned to the residence. The surveillance team further identified the driver of the Oldsmobile as Hart and reported that Hart and two other

men had exited the Oldsmobile and entered the residence. (Doc. No. 134: Gooding Dep., p. 48-49; Kennedy Dep., p. 32-33; Mercurio Dep., p.12-14). Thereafter, Hart and the same two men[1] again left the residence and got into the Oldsmobile. Hart then started the car (Doc. No. 152: Tab 45, Kennedy CIB Statement; Tab 52, Cox CIB Statement). At the same time, two unmarked vehicles, a Chevrolet Tahoe driven by Gooding and a SWAT van driven by another deputy, arrived at the residence.

Upon reaching the residence, Gooding and the driver of the SWAT van drove their respective vehicles into positions blocking the Oldsmobile's exit from the driveway. Gooding immediately exited his vehicle, ran to the front driver's side of the Oldsmobile, informed the occupants that he had a warrant, and ordered the occupants of the Oldsmobile to exit the vehicle

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[1] Gooding and Bauer claim that they did not know that two passengers, Ricardo Robinson and Leon Waiters, Jr., were in the Oldsmobile with Hart. However, construing the facts in favor of the non-moving party, the Court finds that Gooding and Bauer were aware of Robinson and Waiter's presence.

(Doc. No. 134, Gooding Dep., p. 67). Gooding, still giving verbal commands, attempted to open the driver's door, but the door was locked (Doc. No. 134, Gooding Dep., p. 67-68). Deputy Kevin McElyea unsuccessfully attempted to open the front passenger door (Doc. No. 134, McElyea Dep., p. 50). Other deputies surrounded the Oldsmobile and continued to shout verbal commands at the occupants to get out of the car (Doc. No. 134: Gooding Dep., p. 68; Munch Dep., p. 15; McElyea Dep., p. 44-45). At this point, the Oldsmobile was idle (Doc. No. 134, Butsch Dep., p. 52; Munch Dep., p. 20, 40; Weatherington Dep., p. 49-50). According to an eyewitness, a Verizon employee working on a nearby telephone pole, the deputies surrounding the car were approximately six feet from the car and had their weapons raised (Doc. No. 134, Weatherington Dep., p. 46-47). The Oldsmobile then began to move, and the deputies were "trying to get out of the way" of the car (Doc. No. 134, Weatherington Dep., p. 22). At no point

did the deputies do anything to prevent the occupants of the Oldsmobile from getting out of the car (Doc. No. 134, Weatherington Dep., p. 31).

Next, Hart began to drive the Oldsmobile forwards and backwards in the driveway (Doc. No. 134: Gooding Dep., p. 70-72; McElyea Dep., p. 51-52; Mercurio Dep., p. 18; Kennedy Dep., p. 49-50; Weatherington Dep., p. 18). Deputy Randall Butsch claims that at one point he was struck in the left leg by the bumper of the Oldsmobile (Doc. No. 134, Butsch Dep., p. 59). Deputy Michael Kennedy claims that his foot was run over by the left rear tire of the Oldsmobile as it moved forward from the driveway to the front yard (Doc. No. 134, Kennedy Dep., p. 53-54). While several deputies had to jump out of the way of the Oldsmobile to avoid being hit, Plaintiff argues that no one was actually struck. The Verizon eyewitness was surprised no one was struck "[b]ecause the car would move fast - quickly,

and stop quickly, and move fast again. Stopping quickly." (Doc. No. 134, Weatherington Dep., p. 39).

The Oldsmobile continued to move back and forth and then to the left toward the front of the yard. The deputies, yelling at the driver to stop the car, moved alongside the Oldsmobile as it moved. The Oldsmobile then made a hard left such that the front end of the car faced Bahia Vista (Doc. No. 134: Gooding Dep., p. 74-75; Butsch Dep., p. 62-64). At that point, the Oldsmobile accelerated toward the front of the yard, and Gooding fired a single shot at a low angle, aiming for the lower portion of one of the rear tires (Doc. No. 134, Gooding Dep., p. 82-83.) Gooding's shot missed the tire and apparently did not hit anything (Doc. No. 134, Gooding Dep., p. 82-83.) Soon, thereafter, Defendant Deputy Timothy L. Bauer ("Bauer") fired two shots at the driver of the Oldsmobile as the car was moving past him (Doc. No. 134: Bauer Dep., p. 205-072; Butsch Dep., p. 66). One bullet struck the driver's door

just above the keyhole. The other bullet hit Hart. It is undisputed that none of the three shots hit either of the two passengers in the car.

After the three shots were fired, Hart accelerated out of the yard, made a left turn onto Bahia Vista, and headed west for over 0.3 miles (Doc. No. 134: Weatherington Dep., p. 27; Mercurio Dep., p. 28; Wallace Dep., p. 21; Pollack Dep., p. 28). Once on Bahia Vista, Hart attempted to pass an unmarked SCSO vehicle on the left, but, due to the presence of other vehicles, he had to instead pass the unmarked vehicle on the right by driving onto the grass and sidewalk (Doc. No. 134: Mercurio Dep., p. 52-54; Pollack Dep., p. 31-32; Shaw Dep., p. 27-29). As a result, Hart struck a concrete wall and then struck a concrete pole at the intersection of Shade and Bahia Vista (Doc. No. 134, Wallace Dep., p. 29-30; Mercurio Dep., p. 54-55; Pollack Dep., p. 32; Shaw Dep., p. 27-29). Hart and one of the passengers, Ricardo Robinson ("Robinson"), died at the

scene of the accident. The other passenger, Leon Waiters, Jr., survived, but was in a coma for nearly two and one-half months.

On September 26, 2001, Diane Troupe ("Plaintiff") filed the instant suit on behalf of Robinson in the Twelfth Judicial Circuit in and for Sarasota County, Florida (Doc. No. 2). On January 11, 2002, the defendants collectively removed the case to this Court (Doc. No. 1). On May 1, 2003, Plaintiff filed her Second Amended Complaint in which she alleged the following claims pursuant to 42 U.S.C. §1983: Excessive Force by Defendants Gooding and Bauer (Count I); Failure to Protect Decedent from Unconstitutional Harm by Defendants Gooding and Bauer (Count II); Supervisory Liability by Defendant Gooding (Count III); and Municipal Liability by Defendant Sarasota County and Defendant Sheriff Balkwill (Court IV). In addition to these four federal claims, Plaintiff's Second Amended Complaint contains the following five state claims:

Assault and Battery by Defendants Bauer and Gooding (Count V); Assault and Battery by Defendant Balkwill pursuant to the doctrine of respondeat superior (Count VI); Negligence by Defendants Bauer and Gooding (Count VII); Negligence by Defendant Balkwill pursuant to the doctrine of respondeat superior (Count VIII); and Negligent Hiring, Training and Supervision by Defendant Balkwill (Count IX) (Doc. No. 96, Second Amended Complaint). Each defendant has separately moved for summary judgment.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.

See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. Id. at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. See id. When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing there is a genuine issue for trial. Id. at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the

light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. See Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989); see also Samples on behalf of Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. See Augusta Iron & Steel Works v. Employers Ins. of Wausau, 835

F.2d 855, 856 (11th Cir. 1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

III. Motions for Summary Judgment

Four motions for summary judgment have been filed in this case. The County has moved this Court to grant summary judgment in its favor as to Count IV (Doc. Nos. 123). Balkwill seeks summary judgment in his favor as to Counts IV, VI, VIII and IX (Doc. Nos. 125). Bauer has moved this Court to grant summary judgment in his favor as to Counts I, II, V, and VII (Doc. Nos. 128). Gooding seeks summary judgment in his favor as to Counts I, II, III, V, and VII (Doc. Nos. 131). Since each of the these pending motions for summary judgment address

separate counts, the Court will address the motions in the order that those Counts appear in Plaintiff's Second Amended Complaint.

A. § 1983 Claims

1. Count I - Excessive Force of Defendants Gooding and Bauer

Gooding and Bauer move this Court to grant summary judgment in their favor on Plaintiff's claim that they used excessive force in shooting at Hart's moving vehicle.

a. Proximate Causation

As an initial matter, Gooding and Bauer argue that their use of force did not proximately cause Robinson's death. This Court agrees. Causation of damages in a § 1983 action depends on basic principles of tort causation. See Dixon v. Burke County, 303 F.3d 1271, 1275 (11th Cir. 2002). Without causation, Plaintiff's excessive force claim under § 1983 fails as a matter of law. See id. Gooding and Bauer argue that Robinson's death was caused solely by Hart's decision-making

and reckless driving which culminated in the Oldsmobile crashing into a concrete pole. Even construing the facts in the light most favorable to Plaintiff, the Court agrees with Gooding and Bauer that Robinson's death was proximately caused by the actions of Hart and not the actions of Gooding and Bauer.

After being shot by Bauer, Hart drove the Oldsmobile out of the front yard of the residence and made a left turn heading west on Bahia Vista. Once on Bahia Vista, Hart attempted to pass a slow-moving vehicle driven by Detective Richard Wallace, but he had to swerve back to the right to avoid oncoming traffic in the eastbound lane. In trying to pass Wallace's vehicle on the right side, Hart drove the Oldsmobile over the curb and onto the sidewalk where he struck a wall and pole. In total, Hart traveled west on Bahia Vista for over 0.3 miles before hitting the concrete wall and the concrete pole.

It is undisputed that Robinson's death occurred as a result of the Oldsmobile's impact with the concrete pole. The

Court finds, however, that Hart's decision to continue his flight after being shot by Bauer was the intervening cause of Robinson's death. The shots fired by Gooding and Bauer were not the proximate cause of Robinson's death, and, for this reason, judgment should be granted for Gooding and Bauer as to Count I.

b. Excessive Force

However, even assuming that Gooding and Bauer's shots did proximately cause the death of Robinson, the force used was reasonable under the circumstances. "The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002) (citation omitted). To assert a Fourth Amendment claim based on the use of excessive force, the plaintiff must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable. See Evans v.

Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (citation omitted).

i. Seizure

A seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (emphasis in original). Gooding and Bauer assert that there was no seizure because Robinson was not the intended object of their force. In other words, they assert that because they did not intend to shoot Robinson and did not in fact shoot him, Robinson did not suffer a Fourth Amendment seizure. This Court disagrees.

In making this determination, the Court finds the recent Eleventh Circuit opinion of Vaughan v. Lawrence, 343 F.3d 1323 (11th Cir. 2003) instructive. As the Eleventh Circuit noted in Vaughan, the Supreme Court has cautioned against a too finely drawn reading of "means intentionally applied." See

Vaughan. 343 F.3d at 1329 (quoting Brower, 489 U.S. at 598). In Vaughan, the Eleventh Circuit explained that "[i]t is not necessary for the means by which a suspect is seized conform exactly to the means intended by the officer." Id. Rather, "it is enough 'that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.'" Id. (quoting Brower, 489 U.S. at 599).

In the instant case, Gooding fired at the Oldsmobile and Bauer fired at Hart in an attempt to stop the car. Construing the facts in favor of Plaintiff for purposes of summary judgment, a seizure occurred when Gooding and Bauer intentionally fired their weapons at the moving vehicle with the intention of stopping that car. See Tennessee v. Garner, 471 U.S. 1, 7 (1985)("[w]henever an officer restrains the freedom of a person to walk away, he has seized that person.")(citation omitted); see also Fisher v. City of Memphis, 234 F.3d 312, 318-19 (6th Cir. 2000) ("By shooting at the driver of the moving car, [the

officer] intended to stop the car, effectively seizing everyone inside, including the [passenger]."). Having determined that in seizing the Oldsmobile, Gooding and Bauer effectively seized all three occupants of the vehicle, the Court must next determine whether the force used to stop the Oldsmobile was reasonable.

ii. Reasonableness of Force

Gooding and Bauer assert that, even if their actions do constitute a seizure, summary judgment on Count I should be granted in their favor because their use of force was reasonable and justified. The Supreme Court has instructed that "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395 (1989). The determination of whether the force used is reasonable "requires a careful

balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Id. at 396 (internal quotations omitted) (quoting Garner, 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983))). The reasonableness inquiry in a Fourth Amendment excessive force case is an objective one. The question is whether the officer's actions are objectively reasonable in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation. See id. at 397.

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559 (1979), "its proper application requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether

[the suspect] is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of... seizure")). Therefore, courts must analyze use of force on a case-by-case basis "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 369. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. In other words, "the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force." Ferraro, 284 F.3d at 1198. Using these principles, the Court will now examine whether Gooding and Bauer's force was reasonable under the circumstances of this case.

In addressing each of the three Graham factors enumerated above, the Court must draw inferences from the evidence in the light most favorable to Plaintiff, the non-moving party, and resolve all reasonable doubts in that party's favor. The first Graham factor is the severity of the crime at issue. The Eleventh Circuit has instructed that, regardless of the severity of the alleged offense, some force by a police officer when making a custodial arrest is necessary and lawful. See Ferraro, 284 F.3d at 1197 ("'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" (quoting Graham, 490 U.S. at 396)). As the Court noted in its February 6, 2003 Order, the underlying search and arrest warrants were based on the crime of possession of a controlled substance (rock cocaine) with an intent to sell. Hart's criminal history included approximately forty arrests and nineteen

convictions (Doc. No. 134, Bauer Dep., p. 133). Further, at the time of the incident, Hart was out of jail on bail for attempted murder with a firearm, and the firearm had not been recovered (Doc. No. 134, Bauer Dep., p.133). Bauer and Gooding were aware of the above facts and circumstances. Thus, reviewing the record now available to the Court, the Court concludes that the potential criminal activity occurring in or around the residence was sufficiently severe to satisfy the first prong of the Graham analysis.

The second Graham factor addresses whether the suspect poses an immediate threat to the safety of the officers and others. When Gooding and Bauer fired their weapons, all pedestrian and automobile traffic had been blocked in the immediate vicinity of the residence. However, the possibility of harm to the public was not eliminated - Bahia Vista is a residential street that connects nearby with heavily-traveled U.S. 41. Thus, had Hart successfully fled from the scene, his

path of flight could have posed a threat of death or serious injury to the public. Viewing the facts in the best light for Plaintiff, Gooding and Bauer fired their shots from behind the automobile as it was moving away from them. Thus, there was no threat of immediate harm to either Gooding or Bauer. However, the surveillance team and other officers remained in the vicinity of the residence. Had Hart continued his aggressive course of escape, it is likely that his vehicle could have also been a danger to the members of the surveillance team and other members of the SWAT team.

Finally, under Graham, this Court must determine whether Plaintiff was actually resisting arrest or attempting to evade arrest. It is undisputed that Hart was attempting to evade arrest by flight. The Supreme Court has held that an officer may use deadly force to seize a fleeing felony suspect when the officer: (1) "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to

others" or "that he has committed a crime involving the infliction or threatened infliction of a serious physical harm;" (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning, if feasible, about the possible use of deadly force. See Garner, 471 U.S. at 11-12.

Under the instant facts, the deputies wore clothing clearly identifying them as law enforcement officers, had their guns drawn, and had repeatedly shouted at the occupants of the Oldsmobile to exit the vehicle. The occupants of the Oldsmobile flouted these commands to exit, and instead, Hart began to drive the car backward and forward in an effort to escape from the front yard of the residence. Knowing Hart's pattern of evading arrest and his violent criminal history, it was reasonable for the deputies to believe that deadly force was necessary to prevent Hart from escaping.

Thus, after considering the facts and circumstances of this case, the Court finds that Gooding and Bauer's use of deadly force was not excessive. Therefore, Gooding and Bauer are entitled to judgment on Count I.

c. Qualified Immunity

Even if the Court found that Gooding and Bauer had proximately caused Robinson's death and that the force used had violated Robinson's constitutional rights, Gooding and Bauer would still be entitled to immunity from this suit. "Qualified immunity protects government officials, in their individual capacities, from suit unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." Pace v. Capobianco, 283 F.3d 1275,1282 (11th Cir. 2002)(citing Lassiter v. Alabama

A & M Univ., 28 F.3d 1146,1149-50 (11th Cir. 1994)(en banc)). In other words, "[t]he standard of objective reasonableness which is used to assess an officer's entitlement to qualified immunity 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" Priester v. City of Riviera Beach, 208 F.3d 919,925 (11th Cir. 2000)(quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

For qualified immunity to apply, the government official must first prove that he was acting within his discretionary authority. See Cottone v. Jenne, 326 F.3d 1352,1357-58 (11th Cir. 2003). In this case, it is undisputed that Gooding and Bauer were acting within their discretionary authority. Thus, the burden shifts to Plaintiff to show that Gooding and Bauer are not entitled to qualified immunity. See id. at 1358. The Supreme Court has outlined the following two-prong test for determining if an officer is entitled to qualified immunity: (1) taking all of the facts in the light most favorable

to the plaintiff, do the facts demonstrate a violation of a constitutional right, and (2) if so, was that constitutional right "clearly established?" See Saucier v. Katz, 533 U.S. 194, 201 (2001).

As stated above, even construing the facts in a light most favorable to Plaintiff, the Court concludes that a reasonable jury could not find that Gooding and Bauer violated Robinson's constitutional rights when they used deadly force to stop the Oldsmobile driven by Hart. Prior to this September 30, 1999 event, the general law regarding an officer's use of deadly force during an attempted arrest was already clearly established in the Supreme Court case of Tennessee v. Garner. However, as the Supreme Court has stated: "Yet that is not enough. Rather... 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand

that what he is doing violates that right.'" Saucier, 533 U.S. at 202.

The Eleventh Circuit has noted that with Fourth Amendment excessive force claims, there is no bright line test for determining when force is so excessive that a clearly established constitutional right has been violated. See Priester, 208 F.3d at 926 (citation omitted). Construing the facts in the light most favorable to Plaintiff, this Court must determine whether the state of the law at the time of the incident gave Gooding and Bauer fair warning that their force was unconstitutional. See Hope v. Pelzer, 536 U.S. 730,741 (2002).

In Garner, the Supreme Court stated that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. In the instant case, Hart was a felon who was out on bail after having been charged

with attempted murder. When the SWAT team surrounded the Oldsmobile and gave commands to exit the vehicle, Hart instead proceeded to aggressively move the car backward and forward in an effort to flee. To prevent Hart from fleeing and further endangering the lives of others who may have been in his unpredictable path of flight, Gooding shot at the back tire of the Oldsmobile and Bauer shot twice at Hart. Neither of the parties has offered, nor has the Court found, law that would have given Gooding and Bauer fair warning that this force violated the constitutional rights of the occupants of the fleeing Oldsmobile.

For Plaintiff to survive summary judgment on the issue of qualified immunity, she must produce evidence that would allow a fact-finder to find that no reasonable person in Gooding and Bauer's positions would have thought the facts were such that deadly force was necessary to prevent imminent death or great bodily harm to themselves or others. See Wood v. City

of Lakeland, 203 F.3d 1288, 1292 (11th Cir. 2000). Plaintiff has not met this burden. Thus, because the preexisting law did not give Gooding and Bauer fair warning that shooting at the fleeing vehicle and its driver under these circumstances would clearly violate federal law, Gooding and Bauer are entitled to immunity from this suit and judgment in their favor as to Count I. Gooding and Bauer's motions for summary judgment as to Count I are **GRANTED**.

2. Count II - Gooding and Bauer's Failure to Protect Decedent from Unconstitutional Harm

Law enforcement officers may be held liable under §1983 for failing or refusing to intervene when another officer uses excessive force. See Priester, 208 F.3d at 924; see also Ensley v. Soper, 142 F.3d 1402, 1407 (11th Cir. 1998). This claim against Gooding and Bauer, however, presupposes that Gooding and Bauer did in fact use excessive force. As stated above, the Court does not find that the force used by either Gooding or Bauer was excessive under the facts and

circumstances of this case. Therefore, Plaintiffs claim that either deputy failed to protect Robinson from unconstitutional harm must fail.

However, even if the Court had found that Gooding and Bauer used excessive force, liability arises only when the officer is in a position to intervene yet fails to do so. See Ensley, 142 F.3d at 1407 (citations omitted). Specifically, an officer present at the scene has a duty to take reasonable steps to protect a victim of another officer's use of excessive force. See Fundiller v. Cooper City, 777 F.2d 1436, 1442 (11th Cir. 1985). It is undisputed that both Gooding and Bauer's shots happened in rapid succession and occurred within a matter of seconds. Moreover, Plaintiff has come forward with no facts from which a reasonable jury could find that either Gooding or Bauer was in a position to intervene and failed to do so. Accordingly, Gooding and Bauer's respective motions for summary judgment as to Count II are **GRANTED.**

3. Count III - Supervisory Liability of Gooding

Plaintiff also alleges that Gooding, as Bauer's supervisor, should be held liable for any excessive force employed by Bauer. "[Supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation." See Cottone, 326 F.3d at 1360 (citations omitted). The standard for holding a supervisor liable for the actions of his subordinate is extremely rigorous. See id. at 1360-61 (citation omitted). Like Plaintiff's claim in Count II, Plaintiff's claim in Count III presupposes that Bauer's force was unconstitutional. The Court has already found that Bauer's force was not excessive, and, thus, this claim by Plaintiff must also fail. Accordingly, Gooding's motion for summary judgment as to Count III is **GRANTED.**

4. Count IV - Municipal Liability of the County and Sheriff Balkwill

The County and Balkwill separately move for summary judgment on Count IV. In Count IV, Plaintiff alleges a § 1983 claim against the County and Balkwill, in his official capacity, for maintaining "policies, practices and customs exhibiting gross and deliberate indifference to the constitutional rights of the citizens and residents of Sarasota County, which were the moving force behind, as well as the direct and proximate cause of, the constitutional violations committed by the individual defendants against Plaintiff's decedent." (Doc. No. 96, Second Amended Complaint, ¶68).

a. Liability of the County

The County argues that Plaintiff's claim against the County must fail because Plaintiff cannot prove that the County has any authority and responsibility over the law enforcement functions of the Sheriff or that any of the defendants acted as

the final policymaker for the County relative to the law enforcement function at issue in this case.

"A county's liability under § 1983 may not be based on the doctrine of respondeat superior." Grech v. Clayton County, Ga., 335 F.3d 1326,1329 (11th Cir. 2003) (citations omitted). Rather, "[a] county is 'liable under section 1983 only for acts for which [the county] is actually responsible.'" Id. Therefore, counties may be held liable under § 1983 only for the execution of their own governmental policies or customs. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). In other words, a county can never be liable under § 1983 for the acts of those officials whom a county has no authority to control. See Turquitt v. Jefferson County, 137 F.3d 1285, 1292 (11th Cir. 1998).

To succeed on this claim, Plaintiff must prove that: (1) the County has authority and responsibility over the governmental function at issue, i.e., the SCSO law enforcement

function and, (2) Sheriff Balkwill, or any of the other defendants, has final policymaking authority for the County concerning the alleged constitutional violations at issue. See Grech, 335 F.3d at 1330. "A sheriff's policy or act cannot be said to speak for the county if the county has no say in what policy or action the sheriff takes." Id. at 1331. In deciding whether Sheriff Balkwill is the final policymaker[2] for the County in regard to his law enforcement function, the Court must look to Florida law. See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion).

In determining whether the County controls Balkwill,[3] the Court must specifically determine whether the County, under Florida law, has control over Balkwill in his law

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[2] "'Policymaker" in § 1983 jurisprudence... is a term of art that refers to the official or body that speaks with final authority with respect to a particular governmental decision or action." See McMillian v. Johnson, 88 F.3d 1573,1579 (11th Cir. 1996)(citing Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989)).

[3] The Court notes that, at the time of the incident at issue in this case, Geoffrey Monge was the Sheriff of Sarasota County, Florida. Prior to the filing of this suit, Geoffrey Monge was replaced by Balkwill.

enforcement function, particularly for the execution of search and arrest warrants and the training and supervision of his employees in that regard. See Grech 335 F.3d at 1332. In making this determination, the focus is on "control, not labels." See id.; see also McMillian v. Monroe County, Ala., 520 U.S. 781, 786 (1997). Thus, the labeling of Florida sheriffs as "county officials" in the Florida Constitution is not determinative of whether the County has control over Balkwill in regard to the particular law enforcement function at issue in this case. See Grech, 335 F.3d at 1332 (finding the Georgia Constitution's characterization of sheriffs as "county officers" not determinative).

In Florida, sheriffs are independently elected officials, Florida law requires that the independence of such officials be preserved concerning a host of matters, including the selection of personnel and the hiring, firing, and setting salaries of such personnel. See FLA. STAT. § 30.53. Moreover, the manner in

which Flo[illegible] sheriffs are compensated is determined by state statute. See FLA. STAT. § 30.48. Section 30.15 of the Florida Statutes outlines the powers, obligations, and duties of Florida sheriffs. Under that section, Florida sheriffs are required to "[e]xecute all orders of the boards of county commissioners of their counties, for which services they shall receive such compensation, out of the county treasury, as said boards may deem proper" and to "[b]e conservators of the peace in their counties." FLA. STAT. § 30.15(l)(d) & (e). However, this statute does not state or even suggest that a county has a role in a sheriffs law enforcement function. The county in which a sheriff serves is given the power to determine a sheriff's overall budget, but it is given no say as to the specific expenditures of a sheriff. See FLA. STAT. § 30.49. A sheriff may even appeal a county's decision regarding his budget to the Executive Office of the Governor. See FLA. STAT. § 30.49(4). Further, the power to suspend a sheriff from his duties is reserved for the governor,

not the county officials in which the sheriff serves. See FLA. CONST. ART. IV § 7(a).

Regarding law enforcement, the function at issue in this case, Florida sheriffs shall be "conservators of the peace in their counties." See FLA. STAT. § 30.15(l)(e). Thus, sheriffs in Florida act as agents for the state in enforcing the laws of the state. Notably, Florida law does not include law enforcement powers as one of the statutorily created powers of counties. See FLA. STAT. § 125.01. Further, under Florida law, sheriffs are the governmental entities responsible for the neglect and default of their deputies. See FLA. STAT. § 30.07. Counties have no role in the training or supervision of a sheriff's deputies. While the Court acknowledges that the County funds the operation of the SCSO and allegedly provides its representation in this case, these factors are insufficient for this Court to find that a county in Florida has control over the sheriff that services that county. See Grech, 335 F.3d at 1340 n. 25. The Supreme Court in

McMillian v. Monroe County stated that "[t]he county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely." 520 U.S. 781,791 (1997). Similarly, counties in Florida do not have authority to change a sheriff's salary or to refuse payment completely.

The Court notes that the Eleventh Circuit has held that a Florida sheriff is the final policymaker for the county in which he serves in regard to the termination of a deputy. See Lucas v. O'Loughlin, 831 F.2d 232, 235 (11th Cir. 1987). Since Lucas, the Eleventh Circuit has recognized that finding that a sheriff acts as the final policymaker of the county with regard to one function does not necessitate a finding that a sheriff is the final policymaker of the county in regard to other functions. See McMillian v. Johnson, 88 F.3d at 1583 (concluding that a sheriff in Alabama is not a final policymaker

for the county in regard to law enforcement). "[A]n official simultaneously may exercise county authority over some matters and state authority over others." See id. At issue in Lucas was whether a sheriff was a final policymaker for the county with regard to local, administrative duties. At issue in this case is whether a sheriff is the final policymaker with respect to the state law enforcement duties - specifically, the service of warrants.

Clearly, Balkwill is the final policymaker for his agency with regard to law enforcement. See Battista v. Cannon, 934 F. Supp. 400, 404 (M.D. Fla. 1996), but this does not necessarily mean that he is the final policymaker for the county. "[T]hat [the sheriff] has absolute authority over an area shows only that [the sheriff] is a final policymaker in the area; it says nothing about whose authority [the sheriff] exercises in that area, i.e.,

whether [the sheriff] is a final policymaker for the county or the state." McMillan v. Johnson, 88 F.3d at 1582.[4]

In Florida, a county has no authority and control over a sheriff's law enforcement function. Like the Georgia county in Grech, Sarasota County does not, and cannot, direct Balkwill on how to arrest a criminal, how to hire, train, supervise, or discipline his deputies, what policies to adopt, or how to operate his office, much less (and most importantly for the law enforcement function at issue) how to execute search warrants and arrest warrants. Under § 1983, a county is only liable for acts for which the county is actually responsible. See Marsh v. Butler County, 268 F.3d 1014, 1027 (11th Cir. 2001)(en banc). Since Sarasota County is not responsible for the law

[4] The Court notes that finding that a Florida sheriff is not the final policymaker for a Florida county with regard to its law enforcement function does not necessarily mean that a Florida sheriff is instead the final policymaker for the state. See McMillan v. Johnson, 88 F.3d at 1579 ("We need not, and do not, decide whether sheriffs are state policymakers to hold that they are not county policymakers.").

enforcement function of Sheriff Balkwill and the SCSO,[5] Sarasota County is not a proper party to this lawsuit. Accordingly, Sarasota County's motion for summary judgment (Doc. No. 123) is **GRANTED**.

b. Liability of Balkwill in his Official Capacity

Plaintiff's claims against Balkwill "in his official capacity" really amount to claims against the SCSO. An 'official capacity' suit is, in all respects other than name, to be treated as a suit against the entity. See, Welch v. Laney, 57 F.3d 1004, 1008 (11th Cir. 1995). "'Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law [or the Constitution].'" Merideth v. Grogan, 812 F. Supp. 1223, 1231

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[5] Under the Florida Constitution and the Florida Statutes, a sheriff's office is a separate legal entity from the county in which it serves. See Samarco v. Neumann, 44 F. Supp. 2d 1276, 1286 n. 1 (S.D. Fla. 1999).

n.5 (N.D. Ga. 1992) (quoting Hafer v. Melo, 502 U.S. 21, 25 (1991)).

Clearly, a SCSO employee who acted according to a formal written policy of the SCSO would be acting so as to render the SCSO potentially liable for that employee's actions. In this case, Plaintiff is not asserting that the alleged violations resulted from a formal written policy of the SCSO but from custom and practice. Because "[a] county must be held accountable for more than its officially-codified policies," Van Ooteghem v. Gray, 628 F.2d 488, 495 (5th Cir. 1980),[6] "the court should examine not only the relevant positive law, including ordinances, rules, and regulations, but also the relevant customs and practices having the force of law." Mandel v. Doe, 888 F.2d 783, 793 (11th Cir. 1989). To prove § 1983 liability against a county or municipality based on a *de*

[6] Decisions of the former Fifth Circuit filed prior to October 1,1981 constitute binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

facto custom or policy, a plaintiff must establish a widespread practice that, although not authorized by written law or express policy, "is so permanent and well settled as to constitute a 'custom or usage with the force of law.'" Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991) (citations omitted). "In other words, a longstanding and widespread practice is deemed authorized by the policy making officials because they must have known about it but failed to stop it." Id. Further, the municipal policy or custom must have directly caused the alleged constitutional deprivation. See Canton v. Harris, 489 U.S. 378, 386 (1989); see also Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

i. Failure to Discipline

Plaintiff argues that Balkwill has a custom of not adequately disciplining deputies who shoot citizens. A municipality's failure to take remedial steps to correct constitutional violations is not deemed a policy unless "the

failure to take remedial steps ... amount[s] to a deliberate indifference or tacit authorization of the offensive acts." Cannon v. Taylor, 782 F.2d 947, 951 (11th Cir. 1986)(citing Turpin v. Mailet, 619 F.2d 196 (2d. Cir. 1980)). As the Eleventh Circuit has stated, "a *persistent* failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct, thereby establishing a 'custom' within the meaning of Monell." See Fundiller, 777 F.2d at 1443 (citation omitted) (emphasis added).

Immediately following the shooting incident, the Criminal Investigation Bureau's ("CIB") shooting investigation team initiated their investigation as required by the SCSO General Order 4010.06 (Doc. No. 134, Tab 6, Pingel Aff.). On or about October 6, 1999, the CIB shooting investigation team concluded their investigation and submitted their report to the Sheriff and the SCSO Shooting Review Board ("SRB")(Doc. No. 134, Tab 6, Pingel Aff.). The CIB report included

investigative materials and witness statements (Doc. No. 134, Tab 6, Pingel Aff., Attachment). The Court notes that the focus of the CIB's investigation is fact-gathering relative to any potential criminal activity, but that the CIB may also consider whether Gooding and Bauer violated any internal policies (Doc. No. 134, Monge Dep., p. 25-26, 35).

In contrast, the focus of the SRB is on reviewing the CIB report, taking testimony if necessary, and evaluating whether any internal policies were violated (Doc. No. 134, Monge Dep., p. 26-28). In other words, the SRB can expand the investigation beyond that of the CIB (Doc. No. 134, Monge Dep., p. 88). Appointing a SRB was not mandatory; rather, it was at the discretion of Sheriff Geoffrey Monge, the Sarasota County Sheriff at the time of the incident (Doc. No. 134, Monge Dep., p. 26-27). The State of Florida does not require such an investigative board. Nevertheless, Sheriff Monge assigned a new SRB to every shooting case (Doc. No. 134,

Monge Dep., p. 29). With the exception of the Major, each SRB was composed of a different group of members, but always included the Major, two Captains, a firearms instructor, and a first-class deputy (Doc. No. 134, Monge Dep., p. 29).

The SRB convened on October 21, 1999 (Doc. No. 134, Tab 13, Balkwill Aff.). Having already reviewed the CIB report, the SRB panel questioned additional witnesses, reviewed the pertinent SCSO policies, and discussed the facts of the incident relative to the SCSO policies (Doc. No. 134, Tab 13, Balkwill Aff.). Ultimately, the SRB concluded that there had been no violation of any SCSO policies by either Gooding or Bauer (Doc. No. 134, Tab 13, Balkwill Aff.). This conclusion was presented to Sheriff Monge that same day (Doc. No. 134, Monge Dep., p. 62, Exh. 1).

Next, Sheriff Monge accepted the conclusion of the SRB and forwarded the CIB report and the results of the SRB to the State Attorney for his review (Doc. No. 134, Monge

Dep., p. 34). On November 9, 1999, the State Attorney concluded that the use of deadly force was justified (Doc. No. 134, Tab 8, Monge Aff., Exh. A). Then, the United States Department of Justice investigated the incident and determined that there was insufficient evidence to "establish a prosecutable violation of the federal criminal civil rights statutes" (Doc. No. 134, Tab 8, Monge Aff., Exh. B). Upon consideration of these facts, this Court cannot find that disciplinary action was warranted. Further, even if disciplinary action was warranted, no reasonable jury could conclude that the Sheriff, either Monge or Balkwill, has persistently failed to take disciplinary action such that he has established a custom of ratifying use of force.

ii. Ratification of Conduct

Plaintiff also asserts that the Sheriff ratified Gooding and Bauer's conduct by doing the following: persistent failure to discipline; public statements immediately after the incident; lack

of meaningful investigation; subsequent relaxation of the deadly force policy; and subsequent promotions of Gooding and Bauer. In the previous sub-section, the Court already determined that two of these allegations, the persistent failure to discipline and lack of meaningful investigation, are without merit. For the reasons stated below, the Court also finds that the remaining three allegations lack merit.

"[L]iability on the basis of ratification exists when a subordinate public official makes an unconstitutional decision and when that decision is then adopted by someone who does have final policymaking authority" See Matthews v. Columbia County, 294 F.3d 1294, 1297 (11th Cir. 2002). Clearly, liability on this basis presupposes that the subordinate official's decision was unconstitutional. Here, as explained above, the Court has already found that Gooding and Bauer's decisions to shoot were reasonable and justified. Thus, Plaintiff's ratification theory fails under these facts.

iii. Failure to Train

Plaintiff argues that Balkwill does not adequately train SCSO deputies. The Supreme Court has stated that there are limited circumstances in which "failure to train" may be the basis for § 1983 liability. See Canton, 489 U.S. at 387. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality - a 'policy' as defined by our prior cases can [the sheriff's office] be liable for such a failure under § 1983." Id. at 389.

The SCSO SWAT team is comprised of full-time certified SCSO deputies. To be chosen as a member of the SWAT team, an applicant must meet the following criteria: be a first-class deputy in good standing; possess special skill or talent; receive a "good" or better grade on physical fitness testing; have an acceptable score on the obstacle course; and complete both an oral board exam conducted by the SWAT team and a psychological evaluation. In addition to SWAT

duties, all SWAT team members have full-time regular assignments within the SCSO.

It is undisputed that SCSO offered SWAT training classes and required attendance. However, "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 390. From 1987 to September 30, 1999, Gooding participated in 1,435 hours of recorded in-service training and SWAT training with the SCSO in addition to his command and management training he received outside the SCSO (Doc. No. 134, Tab 11, Pelfrey Aff.). This training included training on vehicle take-down, discretionary shooting, stress shooting, use of force during pursuit, bullets and effects on cars, defensive tactics, forced vehicle stops, levels of resistance, scenarios, use of force, vehicle assault, warrant service, hostage rescue, and firearm proficiency training (Doc. No. 134: Tab 11, Pelfrey Aff.; Tab 2, Kenney Aff.). From 1990 to September 30, 1999, Bauer

participated in 1,019 hours of recorded in-service and SWAT training with the SCSO (Doc. No. 134, Tab 11, Pelfrey Aff.). Bauer's training included training on use of deadly force, stress shooting, vehicle take-down, use of force, firearm policy test, forced vehicle stops, defensive tactics, vehicle assault, warrant service, hostage rescue, and extensive firearm proficiency training (Doc. No. 134: Tab 11, Pelfrey Aff; Tab 2, Kenney Aff.). The SWAT team training schedule includes two mandatory days of training per month (Doc. No. 134, Tab 2, Kenney Aff.). Prior to the September 30, 1999 incident, the SWAT team training had included extensive firearm proficiency training and many hours of scenarios of judgment training relative to when it is permissible and impermissible to use deadly force in the course of law enforcement duties (Doc. No. 134, Tab 2, Kenney Aff.). The Court concludes that this training was adequate in relation to the tasks that the SWAT team members performed.

However, even if the SWAT team training had been inadequate, Plaintiff would need to establish that the inadequate training was part of a governmental custom or policy. See Kerr v. City of West Palm Beach, 875 F.2d 1546, 1555 (11th Cir. 1989). To meet this heavy burden, Plaintiff must prove that the failure to adequately train manifested the government's deliberate indifference to the safety of its inhabitants. See id. A government policy cannot be established by a single incident. See Tuttle, 471 U.S. at 823-24. Thus, the Court concludes that there is insufficient evidence for a reasonable jury to find that this is one of the limited circumstances in which the government had a policy of failing to train deputies in deliberate disregard of the safety of its citizens.

All three of Plaintiff's theories of municipal liability under § 1983 must fail. Plaintiff has not produced sufficient evidence that could lead a jury to believe that the alleged violations stemmed from a widespread practice of not

adequately disciplining deputies involved in shooting incidents. Additionally, Plaintiff has not proven that Balkwill ratified unconstitutional conduct of Gooding and Bauer. Lastly, Plaintiff has not met her burden of proving that this case fits the limited circumstances where a failure to train may be a basis for § 1983 liability. Accordingly, Balkwill's motion for summary judgment as to Count IV is **GRANTED.**

B. Pendent State Claims

Having disposed of Plaintiff's federal claims, this Court may decline to exercise jurisdiction over Plaintiff's five remaining pendent state law claims, pursuant to 28 U.S.C. § 1367(c)(3). See, e.g., United Mine Workers of America v. Gibbs, 383 U.S. 715, 727 (1966) ("[I]f the federal claims are dismissed before trial... the state claims should be dismissed as well.); see also Carnegie-Mellon University v. Cohill, 484 U.S. 343,349-50 (1988) (reaffirming authority of district courts to refuse to hear pendent state claims when the federal claim has

been disposed of prior to trial). In deciding whether to dismiss the pendent state claims, this Court should consider judicial economy, fairness, and convenience. See Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1353 (11th Cir. 1997).

In this case, Plaintiff filed her original complaint in state court. Had Defendants not removed this case, it likely would have remained in state court. At this point, all remaining claims are pendent state actions. The interests of judicial economy, fairness, and convenience require that the remaining claims be remanded to state court, which is better equipped to determine the merits of these pendent state claims. Accordingly, this Court declines to exercise supplemental jurisdiction over Plaintiff's five pendent state claims and hereby remands those claims to state court pursuant to 28 U.S.C. § 1367(c)(3).

IV. Conclusion

Upon consideration, it is ORDERED AND ADJUDGED that:

1. Defendant Sarasota County's Motion for Summary Judgment (Doc. No. 123) is **GRANTED**;

2. Defendant William F. Balkwill's Motion for Summary Judgment (Doc. No. 125) is **GRANTED** as to Count IV;

3. Defendant Timothy L. Bauer's Motion for Summary Judgment (Doc. No. 128) is **GRANTED** as to Counts I and II;

4. Defendant Kevin L. Gooding's Motion for Summary Judgment (Doc. No. 131) is **GRANTED** as to Counts I, II and III;

5. The Court declines to exercise supplemental jurisdiction over Plaintiff's pendent state claims pursuant to 28 U.S.C. § 1367(c)(3);

6. The pendent state claims are hereby **REMANDED** to the Twelfth Judicial Circuit, in

and for Sarasota County, Florida; and

7. The Clerk is directed to do the following: **ENTER JUDGMENT** for Defendants Gooding and Bauer on Count I and Count II, for Defendant Gooding on Count III, and for Defendants Sarasota County and Balkwill on Count IV; **CLOSE** the case; and **TERMINATE** all pending motions.

DONE AND ORDERED at Tampa, Florida, this ___ day of January, 2004.

s/_____
SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

[FILED SEPTEMBER 29, 2005]

No. 04-10550-EE

DIANNE TROUPE, as Personal Representative, for the Estate of Ricardo Robinson, deceased,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, et al.,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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Before TJOFLAT and KRAVITCH, Circuit Judges and LIMBAUGH*, District Judge.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) For Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE

*Honorable Stephen N, Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

ORD-42
(12/01)

(3)

MAR 27 2006
OFFICE OF THE CLERK

No. 05- 1100

IN THE SUPREME COURT OF THE UNITED STATES

DIANNE TROUPE, as Personal Representative
For the Estate of Ricardo Robinson, deceased, et al.,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit applied the correct standard in determining whether the passengers in the car driven by the sole suspect sought were subjected to a Fourth Amendment "seizure" when deadly force was used in attempting to stop only the driver.

2. Whether the Eleventh Circuit's ruling that shooting the suspect driver of an automobile does not constitute a Fourth Amendment "seizure" of the passengers is in conflict with this Court's precedent and the decisions of the other circuits.

3. Whether distinguishing what a reasonable officer "could have believed" with what a reasonable officer "would have believed" constitutes a distinction without a difference in analyzing whether the use of deadly force is "reasonable" under the standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989).

4. Whether the Eleventh Circuit's conclusion that a suspect's decision to avoid arrest through vehicular flight constitutes an independent, intervening cause when the suspect's decision preceded the use of force and continued unabated following the use of force is in conflict with decisions of the other circuits.

5. Whether the Eleventh Circuit's qualified immunity analysis followed this Court's standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), when the Eleventh Circuit determined that because the deputies' conduct did not violate a constitutional right there was no need to determine whether the deputies' conduct violated clearly established law.

6. Whether fair notice is provided by *Tennessee v. Garner*, 471 U.S. 1 (1985), that it is unlawful to use deadly force against a fleeing suspect set on evading arrest through vehicular flight where the suspect's car already struck two officers and was a few blocks away from a busy six-lane highway, thereby posing an immediate threat to the general public.

7. Whether the Eleventh Circuit's determination that summary judgment was appropriate in an official capacity claim under 42 U.S.C. § 1983 where no underlying constitutional violation occurred conflicts with decisions of the other circuits.

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INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit correctly followed this Court's standards in holding (1) the actions of the deputies did not cause Petitioners' injuries, (2) the Petitioners were not seized as that term is defined under the Fourth Amendment, and (3) assuming *arguendo* a seizure occurred, the deputies' use of force was objectively reasonable. Thus, the opinion below correctly affirmed the District Court's determination that the individual deputies had not violated the Petitioners' constitutional rights. Accordingly, the opinion below correctly engaged in an abbreviated analysis of whether the deputies were entitled to qualified immunity under this Court's analysis in *Saucier v. Katz*, 533 U.S. 194 (2001), and whether the Sheriff employed an actionable policy or custom relative to discipline and/or training under this Court's analysis in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). Under both the *Saucier* and *Heller* standards, it was appropriate for the Eleventh Circuit to conclude its analysis once it had determined there was no underlying violation. Moreover, as to a Fourth Amendment seizure, the decision below held, consistent with decisions of the other circuits; that stopping a vehicle's driver does not constitute a seizure of a passenger when the passenger is not the intended object of the use of force. Accordingly, because the opinion below is not in conflict with the decisions of the other circuits and correctly applied this Court's standards to the issues presented, the petition should be denied.

STATEMENT OF THE CASE

Petitioners filed their initial complaints in state court in Sarasota County, Florida in 2001. In 2002, Respondents collectively removed the cases to the United States District Court for the Middle District of Florida. In 2003, Petitioners filed their second amended complaints, the operative pleadings at bar, in which Petitioners alleged the following claims under 42 U.S.C. § 1983: Excessive Force against Gooding and Bauer; Failure to Protect Plaintiff from Unconstitutional Harm against Gooding and Bauer; Supervisory Liability against Gooding; and Official